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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

CASE NO. 76-5601

SPITZER AKRON, INC.,

Petitioner,

-vs-

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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STATEMENT OF JURISDICTION

This matter is before the Court on a petition for writ of certiorari to review an order and decision of the U. S. Court of Appeals for the Sixth Circuit entered on June 22, 1976, which upheld and enforced a Second Supplemental Decision and Order of the National Labor Relations Board. The Court's opinion is not cited in the Federal Reporter System but is cited at 92 LRRM 3007 and reprinted at Appendix pages 1-11. The Board's decision is cited at 219 NLRB No. 2, 89 LRRM 1679 and reprinted at Appendix pages 12-25. This Court has jurisdiction to review the instant case by certiorari pursuant to 28 U.S.C. Section 1254 and Section 10(e) and (f) of the National Labor Relations Act. (29 U.S.C. Sections 160(e) and (f)).

This case was originally decided by the Board at 195 NLRB No. 24, 79 LRRM 1286 (reprinted at Appendix pages 39-47.) enforcement granted, 470 F. 2d 1000 (CA 6). A petition for a writ of certiorari was granted by this Court, which vacated

the judgment and remanded the proceedings to the Board. 411 U.S. 979. The Board reaffirmed its original decision in a Supplemental Decision and Order, 208 NLRB No. 80, 85 LRRM 1138. (Appendix pages 28-35. On review the Sixth Circuit reversed and remanded the proceeding again on the basis that petitioner had not been provided an opportunity to present its position on the remand. 504 F. 2d 28. (Appendix pages 26-27). The Board thereafter issued its Second Supplemental Decision which reaffirmed its two prior decisions. It is that last decision which is now before this Court.

QUESTION PRESENTED FOR REVIEW

In light of this Court's decision in N.L.R.B. vs. Burns International Security Services, Inc., 406 U.S. 272 (1972), does a successor employer violate Section 8(a)(5) of the National Labor Relations Act when it retains less than all of the predecessor's employees and unilaterally institutes wage rates, hospitalization plan and other terms of employment at the inception of its acquiring the predecessor company and the predecessor's bargaining agreement having expired.

STATEMENT OF THE CASE

In 1964 a Chrysler-Plymouth auto sales and service facility was operated at 457 East Market Street, Akron, Ohio, by Arnett, Incorporated. On January 15, 1968 a new agency by the name of East Town Chrysler-Plymouth, Inc. operated the agency at the same address. East Town was organized through the co-operation of the Marketing Investments Division of the Chrysler Corporation under an arrangement with one John Wilson whereby Wilson owned 25% of the capital stock and Chrysler Corporation owned 75% of the capital stock. On August 27, 1968 East Town executed a collective bargaining agreement with Local 762 of The International Association of Machinists expiring on August 31, 1970. During this time, there was a collective bargaining agreement between the same union and a multi-employer association, but neither East Town nor Spitzer Akron was a member.

In April of 1970 preliminary negotiations between Chrysler Corporation and certain Spitzer personnel were held with a view to acquiring the Chrysler-Plymouth agency at 457 East Market Street, Akron, Ohio. The initial negotiations

with Chrysler terminated on May 31, 1970 because of differences over the sale price. On July 22, 1970 negotiations reopened and continued throughout August and were finally consummated at about 5:00 p.m. on September 4, 1970 at which time Spitzer Akron, Inc. paid East Town approximately Two Hundred Ninety Thousand Dollars ($290,000.00) for the inventory of 82 new cars and some demonstrator cars. Spitzer Akron, Inc. received its interim license to do business as an automobile dealer from the State of Ohio on August 31, 1970, and was formally organized on September 1, 1970 with Alan Spitzer, John Spitzer and Del Spitzer each owning one-third (1/3) of the capital stock.

On August 13, 1970 East Town notified the Union by letter that it was terminating its contract as of August 21, 1970 and also advised that substantially all of its assets had been sold. East Town, however, did not identify the Purchaser nor was a copy of that letter mailed to Spitzer Akron. As an accommodation to East Town customers, it was agreed that Spitzer Akron, Inc. would complete any work in process and, for accounting purposes only, obligated itself for

payroll expenses effective as of September 1, 1970.

East Town operated a paint and body shop in conjunction with the auto agency. Spitzer Akron did not purchase that operation nor retain any of the employees working in that classification even though they were covered in the former union contract. Spitzer Akron leased the paint and body shop area to one John Irec, an independent operator who hired his own employees and performed work for petitioner and many other customers. Excluding the paint and body shop employees (4 in number), petitioner retained 10 of the 11 East Town employees in the mechanical classification.

After the negotiations were concluded on September 4, 1970 Del Spitzer, John Spitzer and Alan Spitzer immediately held a meeting with the employees to explain the nature of the new dealership and the benefits that would be provided employees. Unilaterally the Company gave wage increases and indicated that it would pay one-half (1/2) of the hospital insurance premiums, which hospital plan was suggested to be better than the plan the employees previously

carried; payment of one-half (1/2) of the uniform expense; pay for 6 holidays per year and a week of paid vacation after a year of service. At the conclusion of the remarks, Del Spitzer asked if any of the employees had any questions and there were none. Witness Andy Parks, who was the shop steward, testified that no derogatory statements about the union or any of its officials were made by any of the Spitzers at that meeting nor was the union even discussed. Although there were no questions raised at the meeting, Andy Parks subsequently reported the remarks to business representative Samuel Ramnytz.

On September 9, 1970 Ramnytz had a meeting with Alan Spitzer wherein Ramnytz indicated that the Union represented the employees of the auto agency and that the Union wanted a contract. At that time Spitzer asked what was involved in the contract. Ramnytz indicated the wage scale and fringe increases that were being negotiated with the dealers association (Spitzer Akron was not a participant or member), and indicated that whatever resulted from the areawide contract was the same contract that the Union would

insist Spitzer sign. At that meeting it was indicated that the company did not foresee any problems pertaining to the wage issue. Alan Spitzer indicated to Ramnytz that the company had just taken over the business, was in the process of taking miscellaneous inventories and organizing the parts department, and that petitioner was in a state of confusion and requested the Union to grant the company an additional two weeks in which to straighten out its organization and make a decision after which they would again meet to discuss the situation. It was indicated to the union representative that the company was not willing to rubber stamp any contract negotiated by the multi-employer group. At that same meeting Ramnytz indicated that Spitzer Akron could continue operating during an existing strike against the multi-employer bargaining group provided that Spitzer Akron would agree to accept the contract which would eventually be signed between the Union and the multi-employer group. Petitioner refused to accept that proposal and subsequently the Union struck petitioner.

During that discussion on September 9, 1970,

Alan Spitzer said that in light of the comments with the employees on September 4th, he doubted that the employees wanted to continue with the Union and suggested that the Union petition the N.L.R.B. for an election and that if the employees selected the Union as their bargaining agent, that he would negotiate a contract. Ramnytz indicated that he had new authorization cards but never actually showed them to Spitzer either on September 9 or at any time thereafter.

On or about September 21, 1970 Ramnytz returned to the auto agency and was then advised by Alan Spitzer that the company was not going to recognize the Union for the reasons stated earlier on September 9, and then again reiterated that the Board should conduct an election to determine representation. On September 22, the employees went on strike and it was still in progress at the time of the hearing before the trial examiner on May 17, 1971.

On March 26, 1971, 10 striking employees formally offered by letter to return unconditionally to work. The company had sent each a letter requesting them to return. Ramnytz testified that 8 of the 10 strikers

went with him one evening for purposes of arranging a return to work but that at that meeting Alan Spitzer said that the men would have to return the next day when the service manager would be present and that he and the service manager would interview them. When Ramnytz and the men came back the next day Alan Spitzer requested each employee to sign a new employment application. When Ramnytz inquired as to why the new application was necessary Alan Spitzer indicated that they were considered new employees and would have to fill out the company's form. However, shortly thereafter, the company's attorney advised the Union and the Union's attorney that the form was only to ascertain their availability for work, that the striking employees were not considered as new employees and that the form was not a prerequisite for returning to work. During the aforementioned interview, some of the employees made arrangements with Alan Spitzer to return to work but all unit employees remained on strike.

The Trial Examiner and the Board, whose determinations were upheld by the Court of Appeals, held

that the company violated its collective bargaining duty under Section 8(a)(5) of the National Labor Relations Act by instituting wage changes and other conditions of employment on the day that it commenced its ownership. It was also held that inasmuch as the strike, which occurred on September 22, 1970, was as a result of the company's refusal to bargain with the Union, the strike was a "protected" unfair labor practice strike.

As part of the remedy and order granted by the Trial Examiner, it was held that the strikers need not be offered reinstatement on the basis that 10 strikers had made a specific unconditional request for reinstatement on March 26, 1971, and on a later date the company had sent them letters requesting them to return. The Trial Eaminer further held that the strikers were entitled to back pay only from the date of the request for reinstatement (March 26, 1971) to the date that they received the letters from the company offering them reinstatement. The Board, whose view was upheld by the Court of Appeals without opinion, overruled the Trial Examiner and held that

the strikers were entitled to reinstatement allegedly on the basis that the company did not make an unconditional offer of reinstatement in March of 1971 because of the request that the strikers sign an employment application form. It also held that the strike was continued as a result of the company's "insistence" on the condition that they return as newly hired employees.

In addition, the Board overruled the Trial Examiner's finding dealing with the entitlement to back pay. The Board ordered that the strikers were entitled to back pay from March 26, 1971 until such time as the company unconditionally offers the strikers reinstatement. The Court of Appeals, in its opinion affirming the Board, merely indicated that the Board's rulings were supported by substantial evidence without further comment on the issues.

ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

In light of this Court's decision in N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272 (1972), does a successor employer violate Section 8(a)(5) of the National Labor Relations Act when it retains less than all of the predecessor's employees and unilaterally institutes wage rates, hospitalization plan and other terms of employment at the inception of its acquiring the predecessor company and the predecessor's bargaining agreement having expired.

This Court, in Burns, held that although Burns had an obligation to bargain with the Union regarding wages and other conditions of employment, its conduct did not constitute a Section 8(a)(5) violation which might occur when an employer unilaterally changes a condition of employment without consulting the bargaining representative. This Court concluded that the unilateral changes in wages and other terms of employment which Burns instituted

were not in violation of the Taft Hartley Act, as Amended, notwithstanding that by July 1, 1967 (the date of change) the Burns agency had already selected its work force of 42 employees, 27 of whom were retained employees. Even if bargaining had occurred on or before July 1, 1967, but after the employees had been hired, Burns: " . . . could have unilaterally initiated such proposals as the opening terms and conditions of employment on July 1 without committing an unfair labor practice." (406 U.S. at 295).

The Court of Appeals herein upheld the Board's decision and followed the Seventh Circuit's original decision in N.L.R.B. v. Bachrodt Chevrolet and construed the Burns decision as relating to the timing of the changes: " . . . Whether they predate or postdate the commencement of the duty to bargain." (See Bachrodt decision, 468 F. 2d at 969).

In the instant case, the Court of Appeals held that when Spitzer Akron instituted its changes on September 4, 1970 (the date Spitzer acquired the

predecessor) [1] a duty to bargain with the Union had already existed on the basis that the operational structure and the hiring of the employees had already been accomplished before Spitzer Akron commenced its operations. It is respectfully submitted that the Court and the Board incorrectly applied the Burns standard. The Board found that prior to the change of ownership on September 4, 1970 the bargaining unit of the predecessor employer consisted of "all auto mechanics, body repairmen, painters, their apprentices and helpers, and lubrication men." When Spitzer Akron commenced operations, however, it did not continue to operate the paint and body shop and thus did not retain all of the employees. At the inception, therefore, the pre-existing bargaining unit itself was altered as a result of the change of ownership. The Board's original findings, unchanged by its Supplemental Decisions or by the Court of Appeals were that

1/ Spitzer Akron, Inc. was not issued its a to dealer's permit from the Ohio Bureau of Motor Vehicles until August 31, 1970. (Exhibit No. 5 - Spitzer).

Spitzer Akron did not retain or plan to retain "all" of the prior employees but retained only 10 out of approximately 15. The percentage of retention in the instant case is approximately 67% as compared to 64% in Burns. The instant case, it is submitted, falls squarely within the permissible parameters enunciated in Burns. In Golden State Bottling Company v. N.L.R.B., 414 U.S. 168 (1973), this Court, following Burns, again acknowledged that a majority of the predecessor's employees were hired by the new employer but that such majority status did not preclude the employer from instituting changes. Cf. Howard Johnson Co. v. Detroit Joint Board, 417 U.S. 249 (1974) reversing the Sixth Circuit regarding the application of Burns to a section 301 action.

Although the Court of Appeals held that the duty to bargain arose prior to September 4th, the Court, nowhere in its opinion, suggested that the unilateral action by Spitzer in discontinuing the paint shop and terminating the painters from inclusion in the bargaining unit or in using less

than all of the previous mechanics was improper or outside Spitzer Akron's authority as a new owner. Petitioner submits that it is incongruous to argue on the one hand that an unfair labor practice has been committed when, on the day that it commenced its operations, Spitzer Akron immediately announced its wage and employment structure, and on the other hand it does not commit an unfair labor practice when it decides to discontinue the paint shop and terminate the painters who are part of the same bargaining unit as the mechanics.

Petitioner does not doubt that the Board will suggest to the Court that inasmuch as it previously has denied a petition for a writ of certiorari in Bachrodt Chevrolet Co., 423 U.S. 927, it should similarly deny a petition for certiorari in the instant case. In that regard, it is contended that Bachrodt and the instant case are factually distinguishable. In Bachrodt there was a specific finding that the successor employer, for a period of time, maintained virtually identical operations,

including the paint shop, and did not discontinue the paint shop operations until it had already commenced its operations. Exactly the opposite situation occurred herein.

The Sixth Circuit, in upholding the Board's Second Supplemental Decision, also held that a duty to bargain arose prior to the institution of the unilateral changes because it was "perfectly clear" in early August of 1970 that Spitzer Akron intended to rehire a sufficient number of employees to retain the union's majority status on the basis of a comment that Del Spitzer stated to one of the mechanics. The Court of Appeals stated that: "Del Spitzer informed the employees that he [wanted] every man to stay on the job, and would carry on as usual." ___F. 2d___, 92 LRRM at 3010. In that regard, it is petitioner's contention that a single isolated casual comment made to one employee is not factually sufficient to raise the comment to a status of "perfectly clear." The alleged comment to mechanic John Hall was not made in the context of any meeting nor

was there any indication that Hall was conversing in any type of status as a union representative or as a union steward. A review of the record would reflect that the comment was actually made in a social tone. There is also no evidence to indicate that the conversation between Del Spitzer and John Hall was ever communicated to any third person or to anyone within the union organization. Additionally, the record is devoid of any discussion as to any particulars regarding wages or other conditions of employment during this conversation between Del Spitzer and Hall. To the contrary, however, it was not until the afternoon of Friday, September 4, 1970, that Spitzer Akron had finally completed the acquisition of the automobile agency and immediately thereupon called a meeting of the employees and announced and explained the nature of its organization, its wage structure and conditions of employment. Spitzer Akron's conduct is no less violative of the Act as was Burns' conduct.

The facts of the instant case do not justify

a conclusion that this is one of those "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit." Here, Spitzer Akron did not sign any contract or prior commitment to hire all or any portion of East Town's employees nor is there any evidence that the wages, hours and other conditions of employment honored by East Town would be assumed by Spitzer Akron. Not only was there no prior commitment, but the bargaining agreement itself had expired.

The Sixth Circuit's decision upholding the Board's Second Supplemental Decision is substantially similar to the Board's argument opposing the petition for certiorari which was initially granted by this Court in Spitzer Akron, Inc. v. N.L.R.B., 411 U.S. 979.

Although the Board, in its Supplemental and Second Supplemental Decisions, gave lip service to this Court's decision in Burns, there is nothing to indicate the basis on which the Board twice reaffirmed their initial decision that Spitzer Akron

had committed an unfair labor practice other than an acknowledgment that the Board has reconsidered the case in light of Burns and that it was "perfectly clear" that Spitzer Akron planned to retain all of the predecessor's employees.

The Court of Appeals relied on the Second Circuit's decision in Railway v. REA Express, Inc., 523 F. 2d 164, 171, that the comments of Del Spitzer were sufficient to establish that the employees were mislead by "tacit inference" into believing that they would be retained without changes in conditions of employment. ___F.2d___, 92 LRRM at 3010. In several instances, the court, in its opinion, used the word "employees" having been told that the company would carry on as usual or that there would be no changes. The record will clearly establish that other than the single isolated comment by Del Spitzer, there was no communication to any other employee or union representative, or that the employee ever communicated Del Spitzer's remarks to any third person so as to establish an inference of no change or to establish that the employees,

individually or collectively, were mislead.

It would be a rare situation where a successor employer would fail to retain a significant number, if not a majority, of the predecessor's employees, if for no other reason than to maintain a certain continuity of operation. The record herein is uncontroverted that the unilateral changes instituted by Spitzer Akron were done immediately upon acquisition of the automobile agency and should not be considered other than as a statement of initial terms. Even in Burns the evidence was uncontroverted that more than a majority of the predecessor's employees were retained by Burns prior to the time that it commenced its operations on July 1, 1967. Therefore, to apply the rationale of the Sixth Circuit's decision herein to Burns, Burns clearly would have violated the Act by unilaterally initiating any changes in conditions or terms of employment.

The Board, in its various decisions, concluded that the unilateral changes instituted by

Spitzer Akron constituted violations of Section 8(a)(5) because it had a precedent duty to bargain. The Trial Examiner had initially stated:

> " . . . . The obligation of the successor employer to bargain with the incumbent union includes the negative injunction to refrain from unilateral changes of wages and other benefits established by the express contract. Hence I must hold that respondent's admitted unilateral increase of wages and other benefits of unit employees the same day that it consummated the purchase of the business was a violation of its collective bargaining duty under Section 8(a)(5) of the Act."

The Board reasserted and upheld the Trial Examiner in that regard when it commented, in its Second Supplemental Decision: (Appendix page 21)

> "Under the teaching of Burns, respondent had a bargaining obligation as a successor to East Town. The respondent's position on that date was akin to that of an employer confronted with a newly selected bargaining representative. It was not free thereafter to establish or change conditions of employment for unit employees without bargaining with the union."*

The Trial Examiner's language, supra, is virtually identical with language appearing in Burns (406 U.S. at 293) and upon which the Board

*This identical language also appears in the Board's Supplemental Decision, Appendix page 34.

relied when it found that Burns had violated the Act by instituting unilateral changes. The above language was rejected by this Court when it ruled that Burns' conduct: " . . . is not like a Section 8(a)(5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative." (406 U.S. at 294).

In this Court's decisions of FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 245-250 (1972) and SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943), this Court held that it was necessary that the administrative agency set forth the grounds upon which its action was undertaken. In the instant matter, however, the Board's opinion does not indicate how it arrived at the conclusions that it did in light of Burns other than to cite the case. The course of the Board was essentially a journey in rephrasing its initial decision as a supplemental decision and then redesignating that decision as a second supplemental opinion. There is absolutely no reflection of change in analysis or conclusion from

the Board's initial decision to its second supplemental decision.

The only significant difference is that in its original decision the Board did not use the Burns language as phrased by this Court. In light of the history and extent of litigation in the instant case, however, it is difficult to understand how the Board could state that, "The instant case is one of the type referred to by the Supreme Court in the above quoted language." (Appendix page 19). Nowhere in its supplemental or second supplemental decisions did the Board set forth or explicate those facts or elements now considered by it, in light of the remand, which it had not previously considered in its initial decision. Viewed in its totality, Spitzer Akron did not commit any unfair labor practice by instituting a change in wage structure, benefits or other aspects of employment and its conduct was merely the establishment of initial terms of operation which were sanctioned by the Burns decision.

The Board, and the Sixth Circuit in upholding the Board's decision, has applied and extended Burns far beyond any context originally envisioned when Burns was decided by this Court. The net effect of the Court of Appeals' decision, if left undisturbed, would be to sanction an application of Burns by the Board in such a manner that it would constructively overrule this Court's language that " . . . a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor . . . . " 406 U.S. at 294-295. Burns permitted unilateral changes at the inception of the successor's operations notwithstanding that a bargaining agreement was still operative. Burns should likewise be applied in a situation, such as the instant case, where the agreement expired prior to the acquisition and the initial terms of employment were announced immediately upon acquisition. Petitioner Spitzer Akron, Inc. prays for review and that its petition

for a writ of certiorari to the Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

ROEMISCH AND WRIGHT

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September, 1976.

APPENDIX

No. 75-2012

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SPITZER AKRON, INC., Petitioner, -v- NATIONAL LABOR RELATIONS BOARD, Respondent.	)	PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Decided and Filed June 22, 1976

Before: PHILLIPS, Chief Judge, and McCREE and LIVELY, Circuit Judges.

PHILLIPS, Chief Judge. This case is before the court on a petition to review and set aside a Second Supplemental Decision of the National Labor Relations Board of July 9, 1975 reported at 219 N.L.R.B. No. 2 and the cross application of the Board for enforcement. The Board reaffirmed its conclusion that Spitzer Akron, Inc. (the Company) violated §§8(a)(5) and (1) of the National Labor Relations Act by unilaterally changing wages and working conditions when it took control of its predecessor's business on September 4, 1970, and by refusing to recognize, meet and bargain with the incumbent union on September 21, 1970. The Board also reaffirmed its conclusion that the employees were unfair labor strikers who were entitled to reinstatement after their unconditional request to return on March 26, 1971. We enforce the order of the Board.

On January 26, 1972, the Board issued its original decision and order, 195 N.L.R.B. No. 24, finding the Company violated §§8(a)(5) and (1) of the Act by refusing to bargain with the union as the exclusive bargaining representative of all employees in the appropriate unit, and ordering it to bargain with theunion. The Board's order required the Company, upon request, to cancel any unilateral changes of benefits or working conditions which it made. The order further required the Company to offer reinstatement to those strikers to whom it had not made an unconditional offer of reinstatement, and to make whole all employees who went on strike for any loss of earnings they might have suffered from the time of their unconditional offer to return to work until the date the Company offered their reinstatement.

In light of the Supreme Court's then recent decision in NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972) and NLRB v. Wayne Convalescent Center, 465 F. 2d 1039 (6th Cir. 1972), this Court granted enforcement of the Board's order, 470 F. 2d 1000, 1001 (1972). Subsequently, upon application of the petitioner herein, the Supreme Court granted certiorari, vacated the judgment and remanded the case to this Court with instructions to remand the case to the Board for such further proceedings as may be appropriate in light of Burns; FTC v. Sperry & Hutchinson, 405 U.S. 233, 245-250 (1972); SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943); Bachrodt Chevrolet Co.v. NLRB, 411 U.S. 912 (1973); and, Denham v. NLRB, 411 U.S. 945 (1973). On August 15, 1973, this Court remanded the case to the Board. On remand, the Board re-examined its original decision in light of Burns and reaffirmed its conclusion that the Company violated Sections 8(a)(5) and (1) of the Act. This Supplemental Decision and Order, issued on January 25, 1974, is reported at 208 N.L.R.B. No. 60.

An appeal was taken by the Company from the Supplemental Order to this Court. We granted the petition for review, and remanded the case to the Board on the basis that petitioner had not been provided an opportunity to present its views on the cases cited in the Supreme Court's order and their applicability to the facts of this case, 504 F. 2d 28, 29 (1974). The Board, having complied with our order of notice and opportunity to be heard, issued its Second Supplemental Decision reaffirming its conclusions. That decision is the basis of the present petition to review.

I.

Reference is made to the decisions of the Board cited above for a detailed statement of the facts. For purposes of this appeal the facts are summarized as follows:

In 1964, Local 762 of the Machinists' Union entered into a multiemployer agreement with certain automobile dealers including Arnett Chrysler-Plymouth, a predecessor of East Town Chrysler-Plymouth (East Town). The collective-bargaining agreement was to expire in 1967 but was extended to August 31, 1970. East Town was not a signatory to the contract of September 1964, nor its amendments; however, on August 27, 1968, the Union and East Town entered into a separate agreement which also expired on August 31, 1970.

In April 1970, representatives of Spitzer Management began negotiating for the purchase of certain assets of East Town, and these negotiations were concluded on September 4, 1970, five days after the expiration of the bargaining agreement. At an employees' meeting on September 4, 1970, shortly after the Company had consummated the purchase of assets from East Town, the employees were informed that wage

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scales and benefits would be greater than the rates paid under the expired contract. Such changes were made without consulting with the incumbent union.

The work force was hired prior to the announcement of the changes in wages and benefits; moreover such changes had not been part of the initial terms of rehiring. Further, when Del Spitzer visited East Town early in August 1970, in connection with family plans for buying the business, he told mechanic John Hall that the Spitzers planned to buy East Town, and would need good mechanics. When Hall suggested that he keep all the East Town mechanics, Spitzer replied that he had checked on them, found they were good men, and "[wanted] every man to stay on the job, and will carry on as usual".

The Board reaffirmed in its Second Supplemental Decision that the Company was conducting the business in essentially the same form and scope as it was before the transfer of ownership (with the exception of the auto body repair and paint shop) using 10 of the 11 men of the East Town work force. Accordingly, under the teaching of Burns, the Company had a bargaining obligation as a successor to East Town. This obligation was not met when the Union demanded recognition on September 21, and the Company refused to recognize and bargain with the Union. The Board also found that when the Company took over the business on September 4 it had hired its "full complement of employees", which consisted of substantially all the men who had worked for East Town; therefore, the Company had a duty to bargain with the Union on September 4 before any changes were made in the conditions of employment. Moreover, the Board found that the facts of the instant case are sufficient to establish a duty to bargain, under the Burns

doctrine, which existed prior to the formal rehiring of employees. It was "perfectly clear" in early August that a majority of the former employees would be rehired.

II.

It appears that the Supreme Court in vacating our original enforcement order was concerned with the fact that our review of the Board's decision was not limited to the grounds upon which the Board purported to act. See Sperry & Hutchinson, 405 U.S. at 249; Chenery, 318 U.S. at 87, 94. Our decision, on the unilateral change question, relied in part on a concept propounded in language in Burns which the Board had not considered previously since that agency's order predated Burns.1/

We have reviewed the record as a whole and find there is substantial evidence to support the Board's finding that the Company was a successor employer and therefore obligated to recognize and bargain with the Union on September 21, 1970. See Burns, 406 U.S. at 280-281; Wayne Convalescent, 465 F. 2d at 1041-42. Further, there is substantial evidence to support the Board's decision that the Company did not have a good-faith doubt of the Union's majority status.

1/ The Supreme Court also vacated and remanded NLRB v. Bachrodt, 468 F.2d 963 (7th Cir. 1972), and NLRB v. Denham, 469 F.2d 239 (9th Cir. 1972), on identical grounds. 411 U.S. 912 (1973); 411 U.S. 945 (1973). Like the instant case, Bachrodt and Denham had relied on Burns in upholding the unilateral change portion of the Board's order. See 468 F.2d at 969; 469 F.2d at 246-47. Bachrodt has been reaffirmed by the Board, 205 N.L.R.B. No. 784 (1973), and subsequently enforced by the Seventh Circuit, 515 F.2d 512 (1975) (unpublished order), cert. denied, 423 U.S. 927 (1975).

Although we agree with the Board that the Company's unilateral changes in conditions of employment on September 4 constituted an unfair labor practice under the teachings of Burns, we believe the Burns' doctrine on this point requires further explanation. On the issue of unilateral changes, the language of Burns which has caused confusion is as follows:

> Although Burns had an obligation to bargain with the union concerning wages and other conditions of employment when the union requested it to do so, this case is not like a §8(a)(5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative. It is difficult to understand how Burns could be said to have changed unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to July 1, no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that Burns changed its terms and conditions of employment when it specified the initial basis on which employees were hired on July 1.

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees'

> bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by §9(a) of the Act, 29 U.S.C. §159(a). 406 U.S. at 294-95.

We construe Burns as relating to the timing of the changes — whether they predate or postdate the commencement of the duty to bargain. As soon as the duty to bargain arises, the successor company cannot institute changes without consulting with the union. As the Seventh Circuit held in Bachrodt:

> Once the duty to bargain is triggered, a successor employer's responsibilities are akin to those of an ordinary employer prior to the negotiation of a formal labor contract but after a bargaining representative has been selected when he has the duty to bargain and, the corollary duty, not to institute changes without consulting the union. 468 F.2d at 969.

Under Burns, the successor employer can set the initial terms upon which rehiring is conditional provided that takes place before the duty to bargain arises. Generally, an otherwise successor can set the initial terms unilaterally without violating the Act since prior to the rehiring of his predecessor's employees, which constitute the majority of his work force in an appropriate unit, there is no duty to bargain. See Nash, Successorship After Burns, 7 Ga. L. Rev. 664, 671 (1973); Pate, The Impact of Burns, 7 Ga. L. Rev. 687, 693-694 (1973) [hereinafter cited as Pate]; Note, The

Bargaining Obligations of Successor Employers, 88 Harv. L. Rev. 759, 778 (1975). The only instance in which the duty to bargain may precede the formal rehiring of employees is where "it is perfectly clear" the otherwise successor plans to retain a sufficient number of his predecessor's employees so that the union's majority status will continue. See Pate, supra at 694; Note, Contract Rights and The Successor Employer: The Impact of Burns Security, 71 Mich. L. Rev. 571, 580 (1973).

In Burns, the duty to bargain did not mature until late June, at a time when the successor had hired the requisite complement of his predecessor's employees. The Court, however, rejected the union's challenge to changes in working conditions unilaterally instituted by Burns in July since they had been incorporated in the initial employment contracts in early June, and thus necessarily predated the duty to bargain. Accordingly, these changes were merely initial terms set by the successor.

In the present case, when the changes were instituted by the Company on September 4, there already existed a duty to bargain with the incumbent union. Not only was the Company's operational structure and practice the same as it was before the transfer of ownership, but the Company had hired, prior to instituting the changes, the employees of its predecessor, which constituted the majority of its work force. The Burns court has approved these factors. In Burns the lower court relied on these elements in determining a successor status:

> "All of the important factors which the Board has used and the courts have approved are present in the instant case: 'continuation of the same types of product lines, departmental organization, employee identity and job functions.' . . . Both Burns and

> Wackenhut are nationwide organizations; both performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally, and perhaps most significantly Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42." 441 F. 2d 911, 915 (1971)(citation omitted). Although the labor policies of the two companies differed somewhat, the Board's determination that the bargaining unit remained appropriate after the changeover meant that Burns would face essentially the same labor relations environment as Wackenhut: it would confront the same union representing most of the same employees in the same unit. 406 U.S. at 280, n. 4

Assuming arguendo, that the formal rehiring took place after September 4, it appears, nevertheless, that a duty to bargain existed when the unilateral changes were instituted. The record establishes that it was "perfectly clear" in early August that the Company intended to rehire a sufficient number of employees to maintain the Union's majority status. Del Spitzer informed the employees that he "[wanted] every man to stay on the job, and would carry on as usual". Consequently, there is sufficient evidence to support a duty to bargain which preceded the formal rehiring of the East Town employees. Moreover, there is nothing to indicate that the employees were aware of the proposed changes in early August; accordingly, these changes can not be considered as initial terms of rehiring under Burns. See Bachrodt, 468 F. 2d at 969.

The Second Circuity, relying on the Board's decision in Spruce Up Corp., 209 N.L.R.B. No. 19 (1974), has considered the "perfectly clear" exception where the initial terms were announced prior to or simultaneously with the invitation to the predecessor's employees. Brotherhood of Railway v. REA Express Inc., 523 F. 2d 164, 171 (1975). The court limited the exception to where the:

> [N]ew employer has either actively or by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Without commenting on the acceptance of this limitation by this court, we believe the facts in the instant case are sufficient, nevertheless, to establish that the employees were misled by "tacit inference" into believing they would be retained without change in the conditions of employment. Here, the employees were told the Company would "carry on as usual."

Our reasoning in the instant case is consistent with our decision in NLRB v. Wayne Convalescent Center Inc., supra. Although the changes instituted by Wayne occurred one month after acquiring the nursing home, the duty to bargain did not arise until after the changes were instituted — formal rehiring occurred after the changes were made. Moreover, it was not "perfectly clear" that Wayne planned to retain a sufficient number of employees to continue

the union's majority status. At the time of the changes it was unclear whether the new owners were planning to continue the nursing home facility or convert the premises to a "bed and board facility". Consequently, the changes in conditions of employment were merely initial terms of employment. 465 F. 2d at 1042, n. 6.

We further conclude that all other parts of the decision of the Board are supported by substantial evidence on the record considered as a whole.

Accordingly, the decision of the Board is enforced.

219 NLRB No. 2 D--147
Akron, Ohio

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SPITZER AKRON, INC.

and Case 8-CA-6177

AUTO MECHANICS LOCAL 1363,
DISTRICT 54 OF THE INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL--CIO

SECOND SUPPLEMENTAL DECISION AND ORDER

On January 26, 1972, the National Labor Relations Board issued its Decision and Order 1/ in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act and ordering that it cease and desist therefrom and, upon request, bargain collectively with the Auto Mechanics Local 1363, District 54 of the International Association of Machinists and Aerospace Workers, AFL--CIO, herein referred to as the Union, as the exclusive representative of all employees in an appropriate unit. The Board also ordered Respondent, upon request, to cancel any changes of benefits or working conditions which it made on September 4, 1970, or later, which may have resulted in financial or other detriment to its employees. Finally, the Board ordered the Respondent to offer reinstatement to those strikers to whom it had not heretofore made an unconditional offer of reinstatement immediate and full

1/ 195 NLRB 114.

reinstatement to their former or substantially equivalent jobs, and to make whole all employees who went on strike on September 22, 1970, for any loss of earnings they may have suffered from the time of their unconditional offer to return to work to the date that the Respondent offered them reinstatement. In light of the Supreme Court's opinion in N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272 (1972), and N.L.R.B. v. Wayne Convalescent Center, Inc., 465 F. 2d 1039 (C.A. 6, 1972), enforcement of the Board's Order was granted on November 27, 1972, by the United States Court of Appeals for the Sixth Circuit. 2/ Subsequently, Respondent petitioned the Supreme Court of the United States for certiorari, and on May 14, 1973, the Supreme Court granted Respondent's motion, vacated the court of appeals' judgment, and remanded the proceeding to that court with instructions to remand the case to the Board for such further proceedings as may be appropriate, in the light of N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272 (1972); Federal Trade Commission v. Sperry & Hutchinson Co., 405 U.S. 233, 245--250 (1972); Securities Exchange Commission v. Chenery Corp., 318 U.S. 80, 87-88 (1943); Bachrodt Chevrolet Co. v. N.L.R.B., 411 U.S. 912 (1973); Denham Co. v. N.L.R.B., 411 U.S. 945 (1973).

On August 15, 1973, the court of appeals issued an unreported order which remanded the case to the Board "for such further proceedings as may be appropriate" in light of the cases cited in the order of the Supreme Court.

The Board reconsidered the case and through an inadvertent oversight failed to notify Respondent Spitzer Akron that the case had been redocketed or to afford it an opportunity to participate. Thereafter the Board issued its Supplemental Decision and Order in which it adhered to its previous finding that Spitzer

2/ 470 F.2d 1000.

Akron had violated Section 8(a)(5) of the Act and determined that "[N]othing in Burns requires the Board to change these findings." 3/ The Supplemental Decision and Order reaffirmed "the findings, conclusions, and remedy" of the original Decision and Order.

On October 14, 1974, the Sixth Circuit Court of Appeals issued an order stating:

> Implicit in the instructions accompanying the remand of the case to the Board was a requirement that the petitioner be given notice of the reconsideration of the case by the Board with an opportunity to present its views on the meaning of the Supreme Court opinions referred to therein and the applicability to the facts of this case thereto, together with the right to petition to reopen proof in the case if it desired to do so. By not affording petitioner an opportunity to be heard and to participate in the reconsideration, the Board has failed to comply with the mandate of this court. [504 F.2d 28, 29.]

Accordingly, the court of appeals granted the petition for review and denied the Board's cross-application for enforcement of the Board's Order. The Supplemental Decision and Order of the Board entered on January 25, 1974, was set aside and the case was remanded to the Board for further proceedings consistent with the provisions of the circuit court's order.

On December 10, 1974, the Board received a memorandum from Respondent presenting "its views on the meaning of the Supreme Court opinions referred to therein and applicability to the facts of this case thereto." Also, Respondent noted, "Incorporated herein as part of this memorandum is the respondent's exceptions filed

3/ 203 NLRB No. 80 (1974).

with the Board prior to the issuance of the Board's decision reported in 195 NLRB No. 24, respondent's brief filed in the United States Court of Appeals (6th Circuit) in Case No. 72-1187, 470 F.2d 1000, respondent's petition for a writ of certiorari filed with the United States Supreme Court and reported at 411 U.S. 979 (1973), and respondent's brief filed before the United States Court of Appeals (6th Circuit) in Case No. 74-1151."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In its original Decision and Order in this case, the Board found that Respondent had violated Section 8(a)(5) and (1) of the Act by making unilateral changes of wages and working conditions of employees in the appropriate unit on September 4, 1970, and by thereafter failing and refusing, on request, to recognize, meet, and bargain with the Union with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of employees in the unit. As noted above, on November 27, 1972, the Sixth Circuit Court of Appeals ordered that the decision of the Board be enforced, stating:

> We conclude that there is substantial evidence to support the conclusion of the Board that Spitzer Akron was a successor employer and was obligated to bargain with the Union as a representative of the predecessor employer, all of whom were employed by Spitzer Akron. N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272 (1972); N.L.R.B. v. Wayne Convalescent Center, Inc., 415 F.2d 1039 (6th Cir. 1972).
>
> We further conclude that all other parts of the decision of the Board are supported

by substantial evidence on the record considered as a whole. [470 F.2d at 1001].

The Board has again reviewed the record duly considering the Respondent's memorandum in the light of Burns and we adhere to our original findings. In this regard, the Board originally found that the Respondent is a successor employer to East Town and obligated to recognize and bargain with the Union as the collective-bargaining representative of the unit employees. The Board, therefore, found that the Company had violated Section 8(a)(5) and (1) of the Act by unilaterally changing the wages and working conditions of employees on September 4, 1970, and by thereafter refusing, on request, to recognize and bargain with the Union. 4/ Finally, the Board concluded that the subsequent strike by the employees on September 22, 1970, was an unfair labor practice strike, caused by the Company's unlawful refusal to bargain, and that the strikers were entitled to unconditional reinstatement upon their application to return to work on March 26, 1971. The Board's Order directs the Company to cease and desist from making unilateral changes in terms and conditions of employment and to bargain with the Union on request. The Order further requires the Company to offer each striker to whom it has not made an unconditional offer of reinstatement immediate and full reinstatement to his former job or a substantially equivalent position, and to make whole all its employees who went on strike for any loss of earnings they have suffered from the time of their unconditional application for work on March 26, 1971, until such time as the Company unconditionally offers them reinstatement.

4/ Member Jenkins joined in the unanimous 3-to-0 decision that the Company violated Sec. 8(a)(5) and (1) of the Act; he added that he did not rely on the Trial Examiner's conclusion that the Company had "no 'good faith doubt'" of the Union's majority.

The facts as found by the Board and sustained by the circuit court show that the Company continued its predecessor's operation in substantially unchanged form; that, prior to assuming control, it indicated an intention to retain the predecessor's employees, and that it effectuated this intention by taking over 10 of 11 of the predecessor's work force in the portion of business which the Company decided to operate.

In this regard, and as noted in our earlier decision, the Respondent is engaged in the business of retail and wholesale selling and servicing of automobiles, parts, and accessories. In 1964, Local 762 of the Machinists, a predecessor local of the Charging Union, entered into a multi-employer agreement with certain automobile dealers, including Arnett Chrysler-Plymouth, a predecessor of East Town Chrysler-Plymouth. Respondent thereafter leased the premises that were occupied by Arnett Chrysler-Plymouth and East Town Chrysler-Plymouth.

The collective-bargaining agreement was to expire in 1967 but was extended to August 31, 1970. East Town Chrysler-Plymouth was not signatory to the contract of September 1964, nor to its amendments. On August 27, 1968, the Union and East Town Chrysler-Plymouth entered into a separate agreement which also expired on August 31, 1970.

On August 13, 1970, East Town Chrysler-Plymouth formally terminated said contract by letter to the Union, and on the same date sent a letter to Chrysler Corporation terminating its franchise as an official Chrysler-Plymouth dealer, effective August 22.

The record further shows that in April 1970 representatives of Spitzer Management began negotiating for the purchase of certain assets of East Town Chrysler-Plymouth, and these nego-

tiations were concluded on September 4, 1970, 5 days after the expiration of the bargaining agreement. The negotiations between Spitzer Akron and East Town or Chrysler Corporation were culminated on September 4, 1970, and, as part of that agreement, Spitzer was to pay retroactively to September 1, 1970, those employees retained. Substantially all of the employees in the bargaining unit under the previous contract were retained by Spitzer Akron. At a meeting wht the employees on September 4, 1970, wage scales and benefits were established by Spitzer Akron which were greater than the previous rates paid under the expired contract.

We noted in our original Decision and Order that the employing industry has been continued by Respondent in essentially the same form and scope as it was before the transfer of ownership, so that it would appear prima facie that Respondent legally succeeds to any bargaining obligation of its predecessor created by the Act. We then conclude that the continuity of the employing enterprise was not substantially disturbed or its nature changed during its interim operation by Chrysler, which was trying to operate it as a viable and thus a saleable business, until such time as Spitzer interests or some other entrepreneur took it over. Therefore, the Respondent took over a going business, not a defunct or liquidated one, and it follows that its bargaining obligation as a successor employer continued. Nothing in Burns requires the Board to changes these findings. Accordingly, we affirm them. Additionally, we affirm our earlier finding that Respondent was not reasonably justified by objective circumstances in doubting the Union's majority status on September 14, 1970, and that Respondent further refused on and after that date to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

In our earlier opinion, we also found that Respondent violated Section 8(a)(5) of the Act when it made unilateral changes of wages and certain working conditions of the employees in the bargaining unit.

In Burns, the Supreme Court held that in the ordinary situation a successor employer is free unilaterally to set initial terms on which it will hire the employees of a predecessor, since, until the successor employer has hired his full complement of employees, it may not be clear that the union represents a majority of the employees in the unit. However, the Court also stated that:

> [T]here will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by §9(a) of the Act, 29 U.S.C. §159(a). [406 U.S. 294--295.]

Clearly, the phrase "plans to retain all the employees in the unit," when read in the light of the sentence which follows, would cover not only the situation where the successor's plan includes every employee in the unit, but also situations where it includes a lesser number but still enough to make it evident that the union's majority status will continue. The instant case is one of the type referred to by the Supreme Court in the above-quoted language.

The evidence indicates that the work force was hired by Respondent prior to the announcement of the changes, and that such changes had not been a part of the initial terms of rehiring. In operating the dealership, Respondent has been conducting the same business (with the exception of the auto body repair and paint shop) as East Town, using 10 of the 11 men in the East Town work force. When Del Spitzer visited the agency early in August 1970, in connection with family plans for buying the business, he told mechanic John Hall that the Spitzers planned to buy the agency, and would need good mechanics. When Hall suggested that he keep all the East Town mechanics, Spitzer replied that he had checked on them, found they were good men, and "I want every man to stay on the job, and we will carry on as usual."

On the evening of September 4, 1970, shortly after Respondent had consummated the purchase of assets from East Town, John and Del Spitzer assembled and talked to the employees at the agency. Del Spitzer explained the family operations in developing dealer franchises, and said the Spitzers had taken over the Chrysler-Plymouth franchise there. He announced that the employees would receive extra pay in their paychecks coming out that day. He also described the Spitzer hospital benefit plan, saying it was better than the plan which the men already had from the Union; he said Respondent would pay one-half of the hospital insurance premiums, as well as one-half of their uniform expenses, and would give them six paid holidays a year, and a week of paid vacation after a year of service. At the close of his remarks, Spitzer asked for questions, but there were none from the men, nor was there any discussion of the Union or its current benefits. Union Steward Andy Parks reported the Spitzer remarks at

once to Ramnytz, business agent of the Union, who said he would contact Respondent about a contract. Ramnytz visited the agency on September 9, and told Alan Spitzer, Norman Hamilton, an officer of Spitzer Management, Inc., and Service Manager Richard Wolfe that the Union represented the employees and wanted a contract. Spitzer said that, after his talk with the men on September 4, he doubted very much that the East Town employees wanted to "continue with the Union," and suggested that the Union sould have a Board election, and, if the employees indicated they wanted the Union, he would be glad to negotiate a contract with it.

We find that when Respondent took over the business on September 4 it had completed hiring its work force, which consisted of approximately 10 employees, substantially all of whom had formerly worked for East Town. Under the teaching of Burns, Respondent had a bargaining obligation as a successor to East Town. The Respondent's position on that date was akin to that of an employer confronted with a newly selected bargaining representative. It was not free thereafter to establish or change conditions of employment without bargaining with the Union. 5/

Moreover, from the facts detailed above, it is apparent that as of September 4 Respondent had planned to and had, indeed, retained substantially all of the employees in the unit and at such time "it was appropriate to have him initially consult with the employees' bargaining representative before he fixe[d] terms." As noted, the Union made its first bargaining demand when its representative visited the agency on September 9, stating that the Union represented the employees and wanted a contract. Thus, it is clear that

5/ Ranch-Way, Inc., 203 NLRB 911 (1973)

Respondent planned to, and did, retain virtually all of its predecessor's employees in the unit, and that these employees were represented by the Union and constituted a majority of the unit both before and after the transfer of ownership.

In its memorandum, the Company contends that the second major issue is whether Respondent failed to bargain in good faith by requesting that the Union seek a Board-conducted election. In this regard, the Board is mindful that under the holding of Joy Silk Mills, Inc. v. N.L.R.B., 185 F.2d 732 (C.A.D.C., 1950), cert. denied 341 U.S. 914 (1951), an employer may refuse to bargain and insist on a representation election when motivated by a good-faith doubt as to the union's majority status. The question whether that doubt is a bona fide one is examined in light of all the facts and circumstances relating to the case.

After another review of the record, we find no objective facts to support the Company's asserted doubt of majority. Mere passage of time since the certification and the possibility of employee turnover in the interim provide no reasonable basis for doubting the Union's continued majority. On the contrary, recognition of the bargaining representative over a number of years and execution of bargaining agreements by two successive operators of the dealership, without challenge, support rather than rebut the presumption of continuing majority status. The Union was not required to reestablish its majority through a Board-conducted election on the proffer of new authorization cards, and no adverse inference may be drawn from its failure to do so.

Further, the Company's unilateral changes on September 4 and the failure of the employees to protest them as a derogation of the Union do not provide a reasonable good-faith basis for doubting

the Union's majority. We agree with the Administrative Law Judge that mere silence of unit employees about the Union or their adherence to it when hearing wage raises and other increased benefits announced for the first time is an equivocal circumstance which falls far short of any reasonable indication that the employees no longer desired union representation; even if that inference could be justified on any theory, any disaffection of the employees at that point could well be attributed to the coercive effects of a sudden unilateral grant of increased wages and benefits which violated both Section 8(a)(5) and (1) of the Act.

Moreover, the record affirmatively shows the employees' adherence to the Union and the Company's awareness of their support. Thus, in the week before the Company's refusal to bargain and the resulting strike, Service Manager Wolfe referred to the operation as a "union shop," whereupon the employees responded that if they did not get a "union contract" they would "hit the bricks." Also, testimony of Union Steward Andy Parks shows that about September 13 or 14 Sales Manager Guy announced to Parks that he was going to discharge two unit employees because they could not do their work. He asked Parks for his comment, and Parks replied he (Guy) had a right to discharge anyone he wanted to at any time, but that Parks would have to report it to the business agent of the Union and "You can take it from there." Neither employee was discharged. Finally, immediately after the Company's refusal to bargain, the employees voted to strike, and 10 out of a unit of 12 or 13 employees joined the strike and walked the picket line. When Business Agent Ramnytz met with President Spitzer after the onset of the strike and again urged recognition of the Union, asserting that the employees still wanted it to represent them, Spitzer did not

question the Union's majority, but merely expressed the view that the employees did not need a union. Accordingly, we find the Respondent's "alleged 'good faith' doubt of the union's majority representation" is without the support of any objective circumstances.

The Company's memorandum states the third major issue for consideration concerns the matter of reinstatement and entitlement to backpay. We have reviewed the record in light of the Company's position and we reaffirm the remedy provided in our original Decision and Order.

On March 26, 1971, the Union notified the Company, by letter, that all 10 strikers, who were named in the letter, offered unconditionally to return to work. The Company subsequently sent a letter to all the strikers, requesting that they report in person. When eight of the strikers reported to Alan Spitzer, Spitzer told them that he was unable to interview them that night without the presence of the service director. Arrangements were made to interview the reporting strikers when they appeared for picket duty the following day. In subsequent interviews, Alan Spitzer announced that the strikers would have to make out new employee application forms before they could be hired, since they were considered new employees. The strikers rejected Spitzer's condition that they return to work as newly hired employees and continued the strike. Thereafter, union counsel received a letter from the Company's attorney stating that the strikers were not being considered as new employees, and that the Company wanted them to fill out the employment forms merely to determine on what date they would be available to return to work. Subsequently, two employees returned to work.

As we earlier found and as the circuit court earlier agreed, there is no indication that unconditional offers of reinstatement were ever made to the other eight strikers. Our Order requires the Company to offer each striker to whom it has not made an unconditional offer of reinstatement immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, and to make whole all its employees who went on strike for any loss of earnings they have suffered from the time of their unconditional application for work on March 26, 1971, until such time as the Company unconditionally offers them reinstatement. Accordingly, we reaffirm the findings, conclusions, and remedy provided in our original Decision and Order.

Dated, Washington, D.C. JUL 9 1975

John H. Fanning, Member

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

SPITZER AKRON, INC. v. NATIONAL LABOR RELATIONS BOARD, No. 74-1151, October 14, 1974

This case is before the court on a petition to review and set aside the supplemental decision of the National Labor Relations Board of January 25, 1974 reported at 208 NLRB No. 80. Enforcement of a previous decision and order of the Board in this case was granted by this court in an order reported at 470 F. 2d 1000 (1972). Subsequently, upon application of the petitioner herein, the Supreme Court granted certiorari, vacated the judgment and remanded the case to this court "with instructions to remand case to the National Labor Relations Board for such further proceedings as may be appropriate in light of Burns International Security Services, Inc. v. NLRB, 406 U.S. 272 (1972). FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 245-250 (1972); SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943); Bachrodt Chevrolet Co. v. NLRB, 411 U.S. 912 (1973); Denham v. NLRB, 411 U.S. 945 (1973)." 411 U.S. 979, 93 S. Ct. 2272, 36 L. Ed. 2d 955 (1973). In compliance with the mandate of the Supreme Court, on August 15, 1973 this court entered an unreported order remanding to the Board "for such further proceedings as may be appropriate" in light of the cases cited in the order of the Supreme Court.

The Board proceeded to reconsider the case without notifying the petitioner Spitzer Akron that the case had been redocketed or affording it an opportunity to participate in any way. Thereafter the Board issued its supplemental decision in which it adhered to its previous finding that Spitzer Akron had violated Section 8(a)(5) of the National Labor Relations Act and determined that "[N]othing in Burns requires the Board to change these findings." The supplemental decision reaffirmed "the findings, conclusions, and remedy" of the original decision and order.

Implicit in the instructions accompanying the remand of the case to the Board was a requirement that the petitioner be given notice of the reconsideration of the case by the Board with an opportunity to present its views on the meaning of the Supreme Court opinions referred to therein and applicability to the facts of this case thereto, together with the right to petition to reopen proof in the case if it desires to do so. By not affording petitioner an opportunity to be heard and to participate in the reconsideration, the Board has failed to comply with the mandate of this court.

The petition for review is granted, and the cross-application for enforcement filed by the Board is denied. The supplemental decision and order of the Board entered on January 25, 1974 is set aside and the case is remanded to the Board for further proceedings consistent with the provisions of this order.

206 NLRB No. 80

D-8211
Akron, Ohio

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SPITZER AKRON, INC.

and

Case 8-CA-6177

AUTO MECHANICS LOCAL 1363,
DISTRICT 54 OF THE INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On January 26, 1972, the National Labor Relations Board issued its Decision and Order 1/ in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act and ordering that it cease and desist therefrom and, upon request, bargain collectively with the Auto Mechanics Local 1363, District 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO, herein referred to as the Union, as the exclusive representative of all employees in an appropriate unit. The Board also ordered Respondent, upon request, to cancel any changes of benefits or working conditions which it made on September 4, 1970, or later, which may have resulted in financial or other detriment to its employees. Finally, the Board ordered the Respondent to offer reinstatement to those strikers to whom it had not heretofore made an unconditional offer of reinstatement,

1/ 195 NLRB 114.

immediate and full reinstatement to their former or substantially equivalent jobs, and to make whole all employees who went on strike on September 22, 1970, for any loss of earnings they may have suffered from the time of their unconditional offer to return to work to the date that the Respondent offered them reinstatement. In light of the Supreme Court's opinion in N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272 and N.L.R.B. v. Wayne Convalescence Center, 465 F. 2d 1039 (C.A. 6, Aug. 29, 1972) (No. 72-1081), enforcement of the Board's Order was granted on November 27, 1972, by the United States Court of Appeals for the Sixth Circuit. 2/ Subsequently, Respondent petitioned the Supreme Court of the United States for certiorari, and on May 14, 1973, the Supreme Court granted Respondent's motion, vacated the court of appeals' judgment, and remanded the proceedings to that court with instructions to remand the case to the Board for such further proceedings as may be appropriate, in the light of Burns International Security Services, Inc. v. N.L.R.B., 406 U.S. 272 (1972); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 245-250 (1972); SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943); Bachrodt Chevrolet Co. v. N.L.R.B., 411 U.S. 912 (1973); Denham v. N.L.R.B., 411 U.S. 945 (1973).

On August 15, 1973, the United States Court of Appeals issued an order which remanded the case to the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

2/ F.2d (C.A. 6) (No. 72-1187).

In its original decision in this case, the Board found that Respondent had violated Section 8(a)(5) and (1) of the Act by making unilateral changes of wages and working conditions of employees in the appropriate unit on September 4, 1970, and by thereafter failing and refusing on request, to recognize, meet, and bargain with the Union with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of employees in the unit.

In the light of Burns, the Board adheres to its findings that Respondent violated Section 8(a)(5) by making unilateral changes of wages and wroking conditions on September 4, 1970, and by refusing on request to recognize, meet, and bargain with the Union, as set forth hereinafter.

The Respondent is engaged in the business of retail and wholesale selling and servicing of automobiles, parts, and accessories.

In 1964, Local 762 of the Machinists, a predecessor local of the Charging Union, entered into a multiemployer agreement with certain automobile dealers including Arnett Chrysler-Plymouth, a predecessor of East Town Chrysler-Plymouth. Respondent thereafter leased the premises that were occupied by Arnett Chrysler-Plymouth and East Town Chrysler-Plymouth.

The Collective-bargaining agreement was to expire in 1967 but was extended to August 31, 1970. East Town Chrysler-Plymouth was not signatory to the contract of September 1964, nor to its amendments. On August 27, 1968, the Union and East Town Chrysler-Plymouth entered into a separate agreement which also expired on August 31, 1970.

On August 13, 1970, East Town Chrysler-Plymouth formally terminated said contract by letter to the Union, and on the same date sent

a letter to Chrysler Corporation terminating its franchise as an official Chrysler-Plymouth dealer, effective August 22.

In April 1970, representatives of Spitzer Management began negotiating for the purchase of certain assets of East Town Chrysler-Plymouth, and these negotiations were concluded on September 4, 1970, 5 days after the expiration of the bargaining agreement. The negotiations between Spitzer Akron and East Town or Chrysler Corporation were culminated on September 4, 1970, and, as part of that agreement, Spitzer was to pay retroactively to September 1, 1970, those employees retained. Substantially all of the employees in the bargaining unit under the previous contract were retained by Spitzer Akron. At a meeting with the employees on September 4, 1970, wage scales and benefits were established by Spitzer Akron which were greater than the previous rates paid under the expired contract.

We noted in our original Decision that the employing industry has been continued by Respondent in essentially the same form and scope as it was before the transfer of ownership, so that it would appear prima facie that Respondent legally succeeds to any bargaining obligation of its predecessor created by the Act. We then conclude that the continuity of the employing enterprise was not substantially disturbed or its nature changed during its interim operation by Chrysler, which was trying to operate it as a viable and thus a saleable business, until such time as Spitzer interests or some other entrepreneur took it over. Therefore, the Respondent took over a going business, not a defunct or liquidated one, and it follows that its bargaining obligation as a successor-employer continued. Nothing in Burns requires the Board to change these findings. Accordingly, we affirm them. Additionally, we affirm our earlier finding that Respondent was not reasonably justified by ob-

jective circumstances in doubting the Union's majority status on September 14, 1970, and that Respondent further refused on and after that date to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

In the earlier case, the Board also found that Respondent violated Section 8(a)(5) of the Act when it made unilateral changes of wages and certain working conditions of the employees in the bargaining unit.

In Burns, the Supreme Court held that in the ordinary situation a successor-employer is free unilaterally to set initial terms on which it will hire the employees of a predecessor, since, until the successor-employer has hired his full complement of employees, it may not be clear that the union represents a majority of employees in the unit. However, the Court also stated that:

> [T]here will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

The instant case is one of the type referred to by the Supreme Court in the above-quoted language.

The evidence indicates that the work force was hired prior to the announcement of the changes, and that such changes had not been a part of the initial terms of rehiring. In operating the dealership, Respondent has been conducting the same business (with the exception of the auto body repair and paint shop) as East Town, using 10 of the 11 men in the East Town work force. When Del Spitzer visited the agency early in August 1970, in connection with family plans for buying the business, he told mechanic John Hall that the Spitzers planned

to buy the agency, and would need good mechanics. When Hall suggested that he keep all the East Town mechanics, Spitzer replied that he had checked on them, found they were good men, and "I want every man to stay on the job, and we will carry on as usual."

On the evening of September 4, 1970, shortly after Respondent had consummated the purchase of assets from East Town, John and Del Spitzer assembled and talked to the employees at the agency. Del Spitzer explained the family operations in developing dealer franchises, and said the Spitzers had taken over the Chrysler-Plymouth franchise here. He announced that the employees would receive extra pay in their paychecks coming out that day. He also described the Spitzer hospital benefit plan, saying it was better than the plan which the men already had from the Union; he said Respondent would pay one-half the hospital insurance premiums, as well as one-half of their uniform expenses, and would give them six paid holidays a year, and a week of paid vacation after a year of service. At the close of his remarks, Spitzer asked for questions, but there were none from the men, nor was there any discussion of the Union or its current benefits. Union Steward Andy Parks reported the Spitzer remarks at once to Ramnytz, business agent of the Union, who said he would contact Respondent about a contract. Ramnytz visited the agency on September 9, and told Alan Spitzer, Norman Hamilton, an officer of Spitzer Management, Inc., and Service Manager Richard Wolfe that the Union represented the employees and wanted a contract. Spitzer said that, after his talk with the men on September 4, he doubted very much that the East Town employees wanted to "continue with the Union," and suggested that the Union sould have a Board election, and, if the employees indicated they wanted the Union, he would be glad to negotiate a contract with it.

We find that, when Respondent took over the business on September 4, it had completed hiring its work force, which consisted of approximately 10 employees, substantially all of whom had formerly worked for East Town. Under the teaching of Burns, Respondent had a bargaining obligation as a successor to East Town. The Respondent's position on that date was akin to that of an employer confronted with a newly selected bargaining representative. It was not free thereafter to establish or change conditions of employment for unit employees without bargaining with the Union. 3/

Moreover, from the facts detailed above, it is apparent that as of September 4, Respondent had planned to, and had indeed retained substantially all of the employees in the unit and at such time "it was appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." As noted, the Union made its first bargaining demand, when its representative visited the agency on September 9, stating that the Union represented the employees and wanted a contract. Thus, it is clear that Respondent planned to, and did, retain virtually all of its predecessor's employees in the unit, and that these employees were represented by the Union and constituted a majority of the unit both before and after the transfer of ownership.

3/ Ranch-Way, Inc., 203 NLRB No. 118

Accordingly, we reaffirm the findings, conclusions, and remedy provided in our original Decision and Order. 4/

Dated, Washington, D.C. JAN 25 1974

John H. Fanning, Member

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

4/ See Bachrodt Chevrolet Co., 205 NLRB No. 122

ORDER OF
THE SUPREME COURT
OF THE UNITED STATES

SPITZER AKRON, INC. v. NATIONAL LABOR RELATIONS BOARD, No. 72-1240, May 14, 1973.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit with instructions to remand the case to the National Labor Relations Board for such further proceedings as may be appropriate, in light of Burns International Security Services, Inc. v. NLRB, 406 U.S. 272 (1972). FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 245-250 (1972); SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943); Bachrodt Chevrolet Co. v. NLRB, ___U.S.___, (1973); Denham v. NLRB, ___U.S.___ (1973).

No. 72-1187
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SPITZER AKRON, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	FILED NOV 27 1972 JAMES A. HIGGINS, Clerk ORDER

Before PHILLIPS, Chief Judge, McCREE, Circuit Judge, and CECIL, Senior Circuit Judge.

This case is before the court on the petition of Spitzer Akron to review and set aside an order issued by the National Labor Relations Board, and on the Board's cross application for enforcement. The Board's decision is reported at 195 N.L.R.B. No. 24. Reference is made to the reported decision of the Board for a detailed recitation of the facts.

We conclude that there is substantial evidence to support the conclusion of the Board that Spitzer Akron was a successor employer and was obligated to bargain with the Union as the representative of the predecessor employer, all of whom were reemployed by Spitzer Akron. N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272 (1972); N.L.R.B. v. Wayne Convalescence Center, ___F.2d___ (6th Cir. No. 72-1081) (Aug. 29, 1972).

We further conclude that all other parts of the decision of the Board are supported by substantial evidence on the record considered as a whole.

It is ORDERED that the decision of the Board be enforced.

Entered by order of the court.

/s/ James A. Higgins
CLERK

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SPITZER AKRON, INC.

and Case 8--CA--6177

AUTO MECHANICS LOCAL 1363,
DISTRICT 54 of the INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL--CIO

DECISION AND ORDER

On July 21, 1971, Trial Examiner Eugene F. Frey issued the attached Decision in this proceeding. Thereafter, the Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs 1/ and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order, as modified herein.2/

1/ As the record, exceptions, and briefs in our opinion adequately present the issues and the positions of the parties, the Respondent's request for oral argument is hereby denied.

2/ Member Jenkins does not rely on the Trial Examiner's conclusion that Respondent had no "good faith doubt" of the Union's majority.

The Trial Examiner found that on September 22, 1970, at least 10 out of about 12 or 13 employees went on strike, that the strike was an unfair labor practice strike, and that the strike was still in progress at the time of the hearing herein on May 17, 1971, with the sanction of the Union. On March 26, 1971, the Union notified the Respondent, by letter, that all 10 strikers identified therein offered unconditionally to return to work.

The Respondent, subsequently, on an unspecified date, sent letters to all strikers requesting that they return to work. On an unspecified evening after receipt of these letters, 8 of the 10 strikers, accompanied by Samuel Ramnytz, union business representative, reported to Respondent's president Allen Spitzer, whereby they were advised that he (Spitzer) was unable to interview each of them that night without the presence of the service director, who had left for the evening. Arrangements were set up to interview each of the strikers when they appeared for picket duty the following day. During the course of these interviews, Spitzer required the strikers to complete and sign new employee application forms. Spitzer advised Ramnytz that the strikers were new employees and couldn't be hired without completing these application forms. The strikers thereafter continued the strike.

On an unspecified date, Union's counsel received a letter from the Respondent's attorney stating that the strikers were not required to execute new application forms, explaining that the Respondent merely wanted to determine when the strikers were available to return to work. Subsequently, on an unspecified date, some of the strikers arranged to return to work during private interviews with Spitzer and his assistant, Norman Hadton.

On a date that Andy Park agreed to return to work, he was ill and reported off sick. Thereafter, a later date for his return was arranged. However, he subsequently fractured his leg and was unable, as

of the hearing date, to resume employment.

John Hall arranged to return to work on May 17, 1971, after receiving a letter on May 12, 1971, from the Respondent offering him employment as a flat-rate mechanic. However, Hall was unable to report to work because he appeared as a witness on behalf of the General Counsel on the date that he had arranged to resume employment. At the conclusion of his testimony, Hall agreed to report for work later that same afternoon pursuant to the direction of the Respondent's counsel. According to Ramnytz, some of the strikers involved in the instant proceeding had actually returned to work prior to the hearing.

In the portion of his Decision entitled "The Remedy" the Trial Examiner set forth the proper standard for determining entitlement to reinstatement and backpay when he stated: "As Respondent employees have been engaging in an unfair labor practice strike, they are entitled to reinstatement upon their unconditional application for reinstatement, and to backpay from the date of such application to the date of an unconditional offer of reinstatement." However, he then found that, although the September 22, 1970, strike was an unfair labor practice strike, the unfair labor practice strikers need not be offered reinstatement because they remained on strike after receiving letters from the Respondent requesting that they return to work. We do not agree with the Trial Examiner that the strikers need not be offered reinstatement. When Spitzer required the strikers to sign an application form as a new employee before he would return them to work and notified Ramnytz that the strikers were to be considered new employees, Respondent was not making the unconditional offer of immediate reinstatement contemplated by the Act. Indeed, rather than abandon the strike and resume their employment under this imposed condition, the strikers chose to continue their strike against the Respondent. Accordingly on the basis of the record evidence, we find the strike was continued and prolonged as a result of the Respondent's insistence on the condition that

the strikers return to work as newly hired employees. Since the Respondent's offer of reinstatement was not unconditional, the strikers had no legal obligation to resume work until such time as the Respondent accedes to their demands or until they terminate the strike. Moreover, as unfair labor practice strikers they remain entitled to reinstatement without regard to whether replacements have been placed in their jobs and whether said reinstatement requires the dismissal of such replacements.

We note, however, that some of the strikers arranged to return to work after the Union was advised by the Respondent's counsel that said application forms were required merely to determine the striker's availability for work, rather than to condition their return as a newly hired employee. In this regard, employees Park and Hall received subsequent unconditional offers from the Respondent to return to work. Park agreed to resume his employment, but he was prevented from doing so because of an injury. Hall agreed to return to work during the hearing. However, the evidence does not reveal whether any of the other strikers received similar unconditional offers of reinstatement, or whether they have arranged, as did Hall and Park, to return to work. Since the Respondent's initial offer of reinstatement was conditional and since the evidence does not disclose that any strikers except Hall and Park have received subsequent unconditional offers of reinstatement, we find that the Trial Examiner erred in concluding that the remaining strikers, if any, need not be offered reinstatement. Accordingly, we shall modify the Trial Examiner's recommended Order and require Respondent to make unconditional offers of reinstatement to the remaining strikers. In this regard we find that the strikers' unconditional offer to return to work on March 26, 1971, remains outstanding and it is not necessary that they make further application.

Likewise the Trial Examiner's finding that the strikers are entitled to backpay only from the date of their unconditional offer to return to work to

the date they received Respondent's letters requesting they return to work is clearly erroneous. For the Respondent's request by letter, although unconditional, was superseded by its demand that the strikers be interviewed and complete new employee applications. Thus, contrary to the Trial Examiner's finding, the letters did not toll backpay. Therefore, the strikers are entitled to backpay from the date they unconditionally requested reinstatement until the Respondent, in fact, unconditionally offers them reinstatement and we shall so provide.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondent, Spitzer Akron, Inc., Akron, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order, as herein modified:

1. Add the following after paragraph 2(b):

"(c) Offer to each of those strikers to whom it has not heretofore made an unconditional offer of reinstatement immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing, if necessary, any replacement employee."

2. Substitute the following for the Trial Examiner's paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(d) Make whole all of its employees who went on strike on September 22, 1970, for any loss of earnings they may have suffered from the time of their unconditional offer to return to work to the date when Respondent unconditionally offers them reinstatement to their former or substantially

equivalent employment."

3. Substitute the attached notice for the Trial Examiner's notice.

Dated, Washington, D.C. JAN 26 1972

John H. Fanning, Member

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT make unilateral changes in wages, rates of pay, hours of employment, or other terms and conditions of employment of our employees in the appropriate unit described below, or fail or refuse in any other manner to recognize, meet, or bargain collectively with Auto Mechanics Local 1363, District 54 of the International Association of Machinists and Aerospace Workers, AFL--CIO, as the exclusive bargaining representative of our employees in said unit, which is described as follows:

> All auto mechanics, body repairmen, painters, their apprentices and helpers, and lubrication men, employed in our place of business in Akron, Ohio, excluding all office clerical employees, salesmen, parts department employees, garage men, and all guards, professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of any of the rights guaranteed to them by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in the proviso to Section 8(a)(3) of the Act.

WE WILL, upon request, recognize, meet, and bargain collectively with the above-named Union as the exclusive bargaining representative of all our employees in the above-described unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if

an understanding is reached, embody such understanding in a signed agreement.

WE WILL, upon request, cancel any changes of benefits or working conditions of our employees which we made on September 4, 1970, or later, and which may have resulted in financial or other detriment to our employees and reimburse them for any financial losses they may have suffered thereby.

WE WILL offer to those strikers to whom we have not heretofore made an unconditional offer of reinstatement, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any replacement employees.

WE WILL make whole all of our employees who went on strike on September 22, 1970, for any loss of earnings they may suffered from the time of their unconditional offer to return to work to the date that we offered them reinstatement to their former or substantially equivalent employment.

SPITZER AKRON, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1695 Federal Office Building, 1240 East Ninth Street, Cleveland, Ohio 44199, Telephone 216--522--3715.

TXD-410-71
Akron, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

SPITZER AKRON, INC.

and Case No. 8-CA-6177

AUTO MECHANICS LOCAL 1363,
DISTRICT 54 of the INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO

William E. Powers, Esq., for the
General Counsel.
Mr. Alfred Roemisch, Esq., and
Stanley M. Morganstern, Esq.
of Cleveland, Ohio, for
Respondent.
Mr. Louis E. Schmidt, of Cleveland,
Ohio, for the Union.

TRIAL EXAMINER'S DECISION

Statement of the Case

EUGENE F. FREY, Trial Examiner: This case was tried before me at Akron, Ohio, on May 17 and 18, 1971, following pretrial procedures in compliance with the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq. (herein called the Act), and involves the issues (1) whether Respondent, Spitzer Akron, Inc., is a successor employer to East Town Chrysler-Plymouth, Inc. (herein called East Town), party to a collective-bargaining contract with the above-named Union, 1/ and bound to recognize and

1/ The parent organization of the Union will be referred to herein as IAM.

bargain with said Union as statutory bargaining agent of employees in an admitted appropriate unit, and (2) whether Respondent refused to bargain with said Union as such agent in various ways in violation of Section 8(a)(5) and (1) of the Act, thereby causing employees in said unit to engage in a strike protected by the Act. 2/ All parties appeared and participated in the trial by counsel or other representative. At close of the testimony all parties waived oral argument but I granted them an opportunity to file written briefs with me on or before June 25, 1971. 3/ Briefs were received by me from Respondent on July 1, 1971, and from General Counsel on July 6, 1971, after an extension of time for filing was granted by the Chief Trial Examiner. After due consideration of the briefs and the record herein, I issued this Decision on July 16, 1971, for release to the parties in the usual course.

Upon the entire record in the case, including my observation of the witnesses on the stand and consideration of arguments made during the trial and in written briefs, I make the following:

Findings of Fact

1. The Businesses of Respondent and East Town, and Status of the Union

Respondent is an Ohio corporation with its principal office and place of business in Akron, Ohio,

2/ The issues arise on an amended complaint issued March 12, 1971 by the Board's Regional Director for Region 8, after Board investigation of a charge filed by the Union on January 8, 1971.

3/ After close of the hearing the parties filed a joint motion and stipulation on June 17, 1971, for correction of the official transcript. The record is hereby corrected and amended in accordance with the joint motion and stipulation, which document is marked in evidence in the record as Joint Exhibit No. 1.

where it is in the business of retail and wholesale selling and servicing of automobiles, parts and accessories. In the year beginning September 1, 1970, Respondent has a reasonable expectation of gross income from such sales and service exceeding $500,000 a year, and in the past year it has had direct inflow of finished products valued in excess of $50,000. Respondent admits, and I find, that it is and has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

At all material times herein East Town has been an Ohio corporation with its principal office and place of business located in Akron, Ohio, where it engaged up to August 22, 1970, in the same type of business as Respondent. In the year prior to August 1970, East Town received gross income from said business in excess of $500,000, and had an annual direct inflow of finished products in excess of $50,000. I find that East Town has been at all material times an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Background Events

In 1964 members of Akron Automobile Dealers Bargaining Group executed a collective-bargaining contract with Local Lodge 762 of IAM, which expired December 8, 1967. One signatory of the contract was Arnett, Inc., which in that period operated a Chrysler-Plymouth auto sales and service agency at 457 East Market Street, Akron, Ohio, the same location now occupied by Respondent. An amendment to said contract executed by the same parties on the latter date extended that document until August 31, 1970. Neither Respondent nor East Town were or are members of the Group or were signatories to that contract or its extension. On August 27, 1968,

East Town executed a separate collective-bargaining agreement with Local Lodge 762 covering employees in the following unit which is hereby found appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All auto mechanics, body repairmen, painters, their apprentices and helpers, and lubrication men, employed by the Employer at its place of business in Akron, Ohio, excluding all office clerical employees, salesmen, parts department employees, garage men, and all guards, professional employees and supervisors as defined in the Act.

During the term of this contract and up to September 4, 1970, East Town occupied the same physical plant as Respondent now occupies, 4/ and operated therein the same type of auto sales and service agency as Respondent now operates in it. On August 13, 1970, East Town formally terminated said contract by letter to the Union (which had become the successor to Local Lodge 762 by merger in April 1970). On the same date East Town sent a letter to Chrysler-Plymouth Division of Chrysler Motor Corporation (herein called Chrysler) terminating its franchise as an official Chrysler-Plymouth automobile dealer, effective August 22.

In January 1968, Chrysler, through its Marketing Investments Division, had created East Town pursuant to a joint venture under agreement with one John Wilson, under which Wilson owned a one-fourth interest and Chrysler a three-fourth interest in East Town. Wilson actively operated the corporation

4/ The East Market Street facility included the new-car sales and showroom with adjacent offices, a used-car lot, service garage in rear of the building, and a paint and body repair shop on the second floor, reached by a ramp from the back street known as North Adolph Street.

as a franchised Chrysler-Plymouth dealer, but under supervision of a board of directors consisting of Wilson and two Chrysler officers, with the identity of the latter officials changing from time to time. East Town leased the premises aforesaid from another subsidiary of Chrysler. Wilson gave up the operation about March 1970, resigning as president and director of East Town. His place was taken by one Lamar Horne, a Chrysler official in the Marketing Investment Division of Chrysler, but Wilson remained as a salaried general manager until about July. When he left, another Chrysler official, John Logan, took over as manager. About the time East Town gave up its dealer franchise, Horne took over the management of the operation for purposes of liquidation and disposal of the assets. In the process, he returned all factory parts in stock to Chrysler, as well as new cars on hand, and tried to sell the remaining assets. In this period, he continued to have service and repair work already contracted for completed.

In the liquidation period prior to termination of the union contract, East Town continued to abide by its terms. On occasion, Horne and Service Manager Richard Wolfe discussed employee grievances and other personnel problems with Samuel Ramnytz, business agent of the Union, and Union Steward Andy Parks, and in course of such discussions the Union learned that Horne was acting as manager for Chrysler only for purposes of closing out the business, but there was no discussion among them about the progress of the liquidation, probable buyers, or the effect of the liquidation on employees.

B. The Advent of Respondent

In April or May 1970, members of Spitzer Management, Inc. (herein called Management), first looked over the East Town plant and operation with a view

to taking over the business. 5/ They had some talks with Wilson and Chrysler officials up to May, when discussions lapsed for disagreement on value of the parts inventory, which prevented final agreement on sale price. Discussions were resumed in July and continued through August. However, Management and Horne did not reach complete agreement on price until about 5 p.m. on September 4, at which time Respondent 6/ paid East Town about $290,000 for inventory of automobiles, parts and work in process on hand; it also agreed to assume and pay the East Town payroll as of September 1, that date being chosen to make the transaction easier from an accounting standpoint.

During the final negotiations between August 31 and September 4, Alan Spitzer and Norman Hamilton, an officer of Spitzer Management, Inc. were on the premises daily, checking assets and working out final details of the transfer. However, Respondent did not assume legal control of the premises and the operation until after midnight on September 5. Respondent actually began operations in the plant on the morning of September 7.

In the period between August 22, the date when East Town terminated its dealer franchise, and

5/ Management is an Ohio corporation composed of members of the Spitzer family which engages in the formation and financing of automobile dealerships which obtain and operate under franchises from one of the Big Three (Chrysler, Ford and General Motors).

6/ Respondent was incorporated by the Spitzer family on September 1, 1970, with Alan Spitzer, his father John Spitzer, and his uncle Del Spitzer, each owning one-third of the capital stock. Alan Spitzer is its president. Respondent received its license to do business as an automobile dealer from the State of Ohio on or about August 31, 1970.

midnight of September 4-5, members of Management were conducting an inventory of all assets preparatory to the purchase, but no cars were sold by East Town, although a few were serviced by its employees and delivered to customers under prior sales, and in this period East Town employees were still performing mechanical work in the repair shop. At this time, Chrysler as owner of East Town and landlord of the premises was operating per se under its own dealer's license. After the sale of assets by a Chrysler subsidiary, Chrysler Development Corporation, to Respondent on September 4, another Chrysler subsidiary, Chrysler Realty Corporation, leased the premises to Respondent with first rent payable October 1, 1970. After it began operations, Respondent subleased the upstairs body and paint shop, with some parking spaces and spray booths, to one John Irec, an independent operator, who has since run that operation under supervision of himself and his wife, with four employees, none of whom are connected with Respondent or do any work in its service department or on agency premises. In arranging for auto body repair and paint work, Respondent usually secures bids from Irec, but does not subcontract such work continually to him, nor does Respondent have any financial or other interest in or control over his business.

In operating the dealership, Respondent has been conducting the same business (with the exception of the auto body repair and paint shop) as East Town, using 10 of the 11 men in the East Town work force. It has also hired and still employs three former East Town management personnel: former service manager Richard Wolfe has been continued in that position, one Philip German has been continued as assistant service manager, and Gerald Guy has been continued as sales manager. None of the three filed new job applications before beginning work for Respondent.

C. Dealings of the Spitzers and Respondent with the Union

When Del Spitzer visited the agency early in August 1970, in connection with family plans for buying the business, he told mechanic John Hall that the Spitzers planned to buy the agency, and would need good mechanics. When Hall suggested that he keep all the East Town mechanics, Spitzer replied that he had checked on them, found they were good men, and "I want every man to stay on the job, and we will carry on as usual."

On the evening of September 4, 1970, shortly after Respondent had consummated the purchase of assets from East Town, John and Del Spitzer assembled and talked to the employees at the agency. Del Spitzer explained the family operations in developing dealer franchises, and said the Spitzers had taken over the Chrysler-Plymouth franchise here. He announced that the employees would receive extra pay in their paychecks coming out that day. He also described the Spitzer hospital benefit plan, saying it was better than the plan which the men already had from the Union; he said Respondent would pay one-half of the hospital insurance premiums, as well as one-half of their uniform expenses, and would give them six paid holidays a year, and a week of paid vacation after a year of service. At close of his remarks, Spitzer asked for questions, but there were none from the men, nor was there any discussion of the Union or its current benefits. Steward Andy Parks reported the Spitzer remarks at once to Ramnytz, who said he would contact Respondent about a contract.

Ramnytz visited the agency on September 9 and told Alan Spitzer, Hamilton and Wolfe that the Union represented the employees and wanted a contract. When Spitzer and Wolfe asked what that "involved," Ramnytz said Respondent should sign "whatever came

out of the area contract then being negotiated," 7/ and if it did so, its employees would continue to work during the strike against the Akron dealers. He explained that the Union was demanding from that group $4.50, $4.75 and $5 an hour in successive years of a 3-year contract. Wolfe commented that he "did not see any sweat there" but also added that Respondent was "not buying a blind pig in a poke" or letting other people negotiate for it. Spitzer said Respondent had just taken over the business, was in process of taking parts inventory and getting the parts department straightened out, and things were in confusion, and asked the Union to give Respondent 2 weeks, after which they would "talk." In the discussion, Spitzer said that, after his talk with the men on September 4, he doubted very much that the East Town employees wanted to "continue with the Union," and suggested that the Union should have a Board election, and if the employees indicated they wanted the Union, he would be glad to negotiate a contract with it. Ramnytz replied "OK, if that is what you want." He also offered to show Spitzer new union authorization cards which he had signed by the employees. The Union never produced the cards.

Ramnytz reported this meeting to the employees, who agreed to give Respondent the 2 weeks. On or about September 21, Ramnytz came to the agency to ask Alan Spitzer "what your position was." Spitzer and Wolfe replied that Respondent would not recognize the Union. Ramnytz reported this to the mechanics, who voted to strike, and on September 22 at least 10 out of about 12 or 13 employees went on strike, which was still in process at time of the hearing, with the sanction of the Union.

Sometime in January 1971, Ramnytz had a talk

7/ The Union was in process of negotiating a new contract with the Akron Automobile Dealers Bargaining Group, but had struck all the dealers on September 1 for lack of agreement on a contract.

with Del Spitzer at the agency, in which he suggested that Respondent recognize the Union, because it had had a contract covering the employees there for several years, and the employees still wanted the Union to represent them. Spitzer replied that he did not think the employees needed a union. Ramnytz suggested that Respondent "should not fight it." Spitzer replied "We are not fighters, we are lovers." Ramnytz said "Let's be lovers and make a contract." Spitzer then referred to extensive damage to showroom windows during the strike and repeated he did not think the employees needed a union. 8/

On March 26, 1971, 10 striking employees formally offered by letter to return unconditionally to work for Respondent. Respondent sent each a letter requesting them to return, but none did. Ramnytz took eight of them to the agency one night for purposes of arranging their return, but Alan Spitzer suggested he would interview them the next day when the service manager was present. When they came back the next morning, Spitzer asked each to sign new employment applications. Ramnytz asked why this was necessary. Spitzer gave an equivocal answer indicating this was necessary, that as they were new employees, he "could not hire them." Later, the Union learned from counsel for Respondent that the new applications were asked for merely to show that the men were available for work. In the interview, some men made arrangements with Spitzer on a date for return to work, but they remained on strike. One of them, Andy Parks, later agreed to return on April 19 after a personal talk with Alan Spitzer,

8/ Sometime late in 1970, Respondent filed suit in the Summit County, Ohio Court of Common Pleas, against the Union, its officers and some employees, seeking an injunction against coercion of employees and physical violence. On December 29, 1970, the Court issued a temporary restraining order against the defendants, limiting the number of pickets at the agency premises, restraining them from interfering by forcible means or threat of force (Continued)

but remained on strike after receiving an anonymous telephone call saying he would be "taken care of" if he returned; he later agreed to return on May 17, but then broke his leg, and has been unable to go back up to time of the trial.

D. Contentions of the Parties and Final Findings and Conclusions Thereon

1. The successorship issue

The record shows, and Respondent admits, that it has continued the same business of East Town at the same location with substantially the same work force and supervisor personnel, and the remarks of Del Spitzer to one mechanic in August make it clear that the Spitzer interests had this continuity in mind before Respondent was created and began operations, and even before the East Town contract with the Union expired. In addition, Respondent has leased the agency premises from the same Chrysler division as East Town, and has continued all aspects of the operation, with the exception of the paint shop operation, which is subleased to an independent operator. Hence, it is clear that the employing industry has been continued by Respondent in essentially the same form and scope as it was before the transfer of ownership, so that it would appear prima facie that Respondent legally succeeds to any bargaining obligation of its predecessor created by the Act. Bachrodt Chevrolet Co., 186 NLRB No. 151; N.L.R.B. v. Colten, 105 F. 2d 179, 183 (C.A. 6); Interstate 65 Corporation, 186 NLRB No. 41; The William J. Burns International Detective Agency, Inc., 182 NLRB No. 50; Hackney Iron & Steel Co., 182 NLRB No. 53.

8/ (Continued) with ingress to and egress from the premises, and from causing physical damage to the real or personal property of Respondent, its employees or customers. The injunction was still in effect at time of the trial herein.

Respondent argues that these principles and the supporting authorities do not control here because this is not the usual type of successorship as considered in those cases, in that (1) Respondent did not buy the assets and business from East Town which had dealt with the Union, but from a division of Chrysler after it took over the assets and operations on default of East Town, and (2) before Respondent was created and took over the business, the contract with the Union had expired, and no negotiations for a new contract were pending with East Town. The record shows that Chrysler stepped in and kept the operation going partially, to protect its own investment after Wilson gave it up, but it is also clear that during the reduced operation it maintained the same labor force and adhered to the union contract until its expiration date, so I must conclude that the continuity of the employing enterprise was not substantially disturbed or its nature changed during its interim operation by Chrysler, which was obviously trying to operate it as a viable and thus saleable business, until such time as the Spitzer interests or some other entrepreneur took it over. Hence, Respondent took over a going business, not a defunct or liquidated one. It follows that its bargaining obligation as a successor employer under the above cases continued.

The fact that the Union's contract had expired, and no negotiations were pending, when Respondent took over the business, did not relieve Respondent of its obligation. The Board and courts have held that the bargaining obligation of an employer under a prior collective-bargaining agreement continues even after that agreement has expired and during the period between such agreements, 9/ and that where the transfer of assets from one employer to

9/ Industrial Union of Marine & Shipbuilding Workers v. N.L.R.B., 320 F. 2d 615, 620 (C.A. 3), cert. denied 375 U.S. 984; The William J. Burns International Detective Agency, Inc., supra.

another leaves intact the identity of the employing enterprise, the duty of the former to recognize and bargain with an incumbent union, even in the period between contracts, devolves on the latter as the successor employer. Overnite Transportation Co., 157 NLRB 1185, enforced 375 F. 2d 765, (C.A. 4), cert. denied 398 U.S. 838; The William J. Burns International Detective Agency, Inc., supra.

The same authorities hold that the obligation of the successor employer to bargain with the incumbent union includes the negative injunction to refrain from unilateral changes of wages and other benefits established by the expired contract. Hence, I must hold that Respondent's admitted unilateral increase of wages and other benefits of unit employees the same day that it consummated the purchase of the business was a violation of its collective-bargaining duty under Section 8(a)(5) of the Act.

Respondent tries to distinguish the William J. Burns case because on review of the Board's decision therein (182 NLRB No. 50), the U. S. Court of Appeals, Second Circuit, on April 26, 1971 (77 LRRM 2081) refused to enforce the Board's bargaining order against the successor employer insofar as it ordered that employer to honor a collective-bargaining contract negotiated by the predecessor employer with a union only shortly before the transfer of ownership, on the theory that such order compelled the successor to accept a contract not negotiated by it, in violation of Section 8(d) of the Act. However, the Court still agreed with the basic principle reiterated by the Board and the courts as found above, that requires the employer succeeding to control of a continuing business enterprise to recognize and bargain with the union representing the unit employees therein (77 LRRM at p. 2083). Hence, the Circuit Court did not limit, but rather recognized the basic principle.

2. The refusal to bargain

I have already found on the basis of the authorities cited that Respondent technically violated

Section 8(a)(5) of the Act on September 4 by its unilateral changes of existing wages and working conditions of unit employees, and this alone would suffice to support an order to bargain in the usual form. However, the pleadings raise the issue whether Respondent has continued in any other respect to recognize or bargain with the Union, and both sides have argued the point whether Respondent after September 4 had a bona fide doubt of the Union's majority status. At the outset, it is significant that after union agent Ramnytz on September 9 first requested Respondent to make a contract, 10/ his only suggestion about bargaining procedure was that Respondent accept

10/ In his testimony Ramnytz tried to advance the date of the Union's demand to an unidentified date in August, at which time he says he told Alan Spitzer and Wolfe that the Union had a contract and wanted to renew it because of the Group contract which was in negotiation at the time. I do not credit this story for various reasons: (1) while Ramnytz recalls the talk of September 9 with Spitzer, he cannot recall the earlier date, which would be essential to support General Counsel's claim that Respondent (though not yet in existence) had been operating the agency since August 19 as a successor employer (2) the alleged request for renewal of the current contract was not a proper request for bargaining because it was apparently tied to the pending negotiations with the Akron Dealers' Group (as appears in his remarks on September 9), and (3) the facts clearly showing the Spitzer interests did not close the deal with East Town and take over the business until late on September 4 gives the lie to Ramnytz' statement that the Spitzers indicated as early as August 19 that they were "already carrying on the business." Hence, I find no credible proof that the Union made any demand for bargaining, much less a proper one, on August 19 or earlier.

whatever contract terms came out of the pending negotiations with the Akron Dealers Bargaining Group. While Respondent did not at first glance see any great problem about the Union's wage demands to the Group, it did refuse to accept blindly any overall Group contract without negotiating contract terms for itself, and then asked for a short period to get its business straightened out before entering on serious negotiations. The Union agreed to this, and was also receptive to Respondent's offer that it would negotiate a contract if and when the employees chose the Union in a Board-conducted election. I see no conduct of Respondent in this discussion which would justify a bargaining order, because the Union was trying to force Respondent to accept an outside contract as and if worked out by others, without negotiation, in order to avoid a strike of its employees. On this point, Respondent relies on the statement of the Second Circuit Court of Appeals in the William J. Burns case that "Neither the applicable case law nor the national labor policy justifies the Board in imposing a collective agreement upon an unwilling party who had no part in the negotiation of the agreement" (77 LRRM at page 2083). I agree with this view, and hold that Respondent did not on September 9 engage in any violation of the Act, particularly since it did not at that time express any doubt about the Union's majority status and was willing to negotiate a contract with it after an election or a short moratorium while it got its new business operating. 11/

11/ I do not accept Respondent's argument that the Union never made a clear and unequivocal demand for bargaining on September 9, for although Spitzer and Ramnytz gave different versions of what Ramnytz said on this subject, the gist of the whole conversation as found above from testimony of both makes it clear that Ramnytz was then seeking recognition of the Union and consummation of a contract, and Respondent's reply, asking "what was involved," which elicited Ramnytz' statement of wage demands and request for signature of the Group contract when consummated, leaves no doubt that it viewed the first (Continued)

However, when Ramnytz on September 21 came back to request bargaining in effect, Respondent for the first time flatly refused to recognize the Union, which precipitated the strike the next day.. Respondent gave no reason for its refusal, other than to state the employees did not need a union, and to refer to instances of strike violence and damage to its property. Respondent tries to justify this refusal on the ground of a good-faith doubt of majority status, which it claims arose from (1) the failure of the unit employees to raise any questions on September 4 about the new wages and working conditions announced unilaterally that evening, (2) the Union's certification as bargaining agent was "several years old," so that the 1-year presumption of majority status after such certification does not apply; and (3) the Union's latest contract had just expired. In my view, none of these factors support the claim of bona fide doubt.

First, mere silence of unit employees about the Union or their adherence to it when hearing wage raises and other increased benefits announced for the first time is an equivocal circumstance which falls far short of any reasonable indication that the employees no longer desired union representation; even if that inference could be justified on any theory, any disaffection of the employees at that point could well be attributed to the coercive effects

11/ (Continued) remarks as a request for negotiations. A request for bargaining need not follow any specific or precise wording or formula, but will be sufficient so long as there is a clear communication of meaning, and the employer understands that a bargaining demand is being made. N.L.R.B. v. Barney's Supercenter, Inc., 296 F. 2d 91, 93 (C.A. 3); Beverages, Inc., 182 NLRB No. 136.

of a sudden, unilateral grant of increased wages and benefits which violated both Section 8(a)(5) and (1) of the Act. 12/ Having used such coercion, the employer should not be permitted to profit by his own unfair labor practices which might tend to undermine the Union's past majority status. 13/

Second, the record shows that Local 762 was certified by the Board in 1961 as bargaining agent for unit employees working then for Arnett, Inc. After East Town succeeded Arnett in running the business, and the Union in 1970 took over the duties of Local 762 by merger, including the 1964 contract, it is clear that the Union continued to represent unit employees as statutory bargaining representative at least up to August 31, 1970, without objection from Arnett, East Town or even the Spitzer family when they began to work out a purchase of the business. 14/ Hence, all the circumstances support an inference of continuance of the Union's majority status, and Respondent offers no cogent proof of unusual circumstances to rebut any presumption of continuance of

12/ See cases cited in footnote 9 above.

13/ Harold W. Hinson, d/b/a Hen House Market No. 3, 175 NLRB No. 100.

14/ The normal presumption of majority status of a union continues during the operation of a contract having a union shop and checkoff clause which requires all unit employees to be members of the union.

Having thus chosen a bargaining agent, there is no reason to believe that the employees would change their attitudes merely because the identity of their employer had changed. N.L.R.B. v. Albert Armato, 199 F. 2d 800, 803 (C.A. 7).

that status in Local 762 and later the Union, after May 12, 1962. 15/

Finally, even if a claim of good-faith doubt as late as September 21 were supported by record facts or some theory other than urged above, it would be substantially weakened by two sets of circumstances:

(1) Uncontradicted testimony of steward Parks shows that about September 13 or 14 Sales Manager Guy announced to Parks that he was going to discharge two unit employees because they could not do their work. He asked Parks for his comment, and Parks replied he had a right to discharge anyone he wanted to at any time, but that Parks would have to report it to the business agent of the Union and "you can take it from there." Neither employee was discharged. While Guy as sales manager would appear to have authority only over salesmen, who are excluded from the appropriate unit, he did not testify, hence I must

15/ It is well settled that, absent unusual circumstances, there is an irrebuttable presumption that the majority status of a certified union continues for 1 year after the date of its certification. After the first year the certificate still continues that presumption, but it is normally rebuttable by an affirmative showing that the union no longer commands a majority. Moreover, where the certificate is a year or more old an employer may withhold further bargaining without violating the Act, and insist that the union reestablish its statutory representative status if, but only if, he in good faith has a reasonable doubt of the union's continuing majority status. The employer must, however, adduce cogent proof of objective facts to furnish a reasonable basis for such doubt, and cannot rely on a mere assertion of it or proof only of his subjective frame of mind. Laystrom Manufacturing Co., 151 NLRB 1482, 1484, enforcement denied on the facts, 359 F. 2d 799 (C.A. 7); Coca-Cola Bottling Works, Inc., 186 NLRB No. 142.

infer that his remarks to Parks indicated to the latter that he had some discharge authority over unit employees, and that he was advising Parks as union steward beforehand about discipline contemplated against unit employees. I also find from uncontradicted testimony of Parks that: About a week before the strike started Service Manager Wolfe called all mechanics and body repair men together and asked them "what are you trying to do, sabotage me?", complaining that shop employees were taking off from work without reporting in as absent, which made it hard for him to get work out on schedule as promised to customers. He commented that if that was the way the Union conducted operations, he wanted no part of it, and was glad he had never worked in a union shop before. The men told him that if they did not get a contract they would "hit the bricks." He replied that if a strike occurred, "I could care less." 16/ I find from these facts that Respondent after September 9 continued to recognize the Union as bargaining agent of unit employees, and had reason to believe most of them would continue to adhere to it by striking if Respondent did not reach an agreement with it.

(2) All but one or two of the unit employees began a strike on September 22nd sanctioned by the Union, and such concerted action after Respondent flatly denied recognition to the Union was clear notice to Respondent that a majority of unit

16/ I make no finding that Wolfe's remarks to the group indicated significant antiunion animus on the part of Respondent, because the occasion and tenor of his remarks clearly show he was irritated, if not actually angered, by unusual absenteeism among the unit employees; Parks admitted Wolfe had a legitimate complaint about employees going absent without leave or notice.

employees still adhered to the Union. 17/ It follows, and I find, that Respondent did not have a good faith doubt of the Union's majority status on September 14, 1970, and further refused in good faith on and after that date to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act. 18/

Since the unit employees struck on September 21 because of Respondent's illegal refusal to bargain with the Union, I must also find that the strike of that date was an unfair labor practice strike. Respondent argues that the strike should not be considered "protected" under the Act because of the incidence of extensive physical damage to its property during the course of the strike. The record shows that a local State court issued a preliminary injunction against strike violence against the Union, its agents and some strikers, but the evidence which supported that decision, and which might service to bring the violence and property damage home to the Union and its members on strike, was not offered by Respondent, and the union agent and its members who testified in this case denied any agency for or connection with the violence and damage. However, Ramnytz admitted the existence of the property damage and at least one altercation between a striker and a company supervisor. Respondent argues from this that the Board may infer that the "Union or its members had something to do with

17/ N.L.R.B. v. Harris-Woodson Co., Inc., 179 F. 2d 720, 723 (C.A. 4); N.L.R.B. v. I. Taitel and Son, 261 F. 2d 1, 4 (C.A. 7); Canton Sign Co., 174 NLRB No. 133; Pacific Abrasive Supply Co., 182 NLRB No. 48.

18/ The above circumstances, in my view, far outweigh the significance of the facts that Ramnytz on the 9th had been in apparent agreement with the idea of a new election, and had offered to show new authorization cards which he had procured from them some days earlier, but never did produce them.

the damage, as it all occurred during the duration of the strike." However, since General Counsel is claiming on the basis of well-settled law 19/ that the unfair labor practice strikers are entitled to backpay from the time of their unconditional offer to return to work until a proper offer of reinstatement, it requires cogent proof in this proceeding of their connection with or liability for the damage done, to deny them that substantial right of backpay. I find the record devoid of such proof. 20/

III. The Effect of the Unfair Labor Practices upon Commerce

The activities of Respondent set forth in section II, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusion of Law

1. Respondent and East Town are employers engaged in commerce, and the Union is a labor organization, within the meaning of the Act.

2. All auto mechanics, body repairmen, painters, their apprentices and helpers, and lubrication men, employed by Respondent at its place of business in Akron, Ohio, excluding all office clerical employees, salesmen, parts department employees, garage men, and all guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

19/ Phelps-Dodge Corp. v. N.L.R.B., 313 U.S. 177.
20/ Artcraft Mantle & Fireplace Co., 174 NLRB No. 110 (pages 9, etc. of Decision of Trial Examiner, adopted by the Board).

3. At all material times mentioned in this Decision the Union has been the exclusive representative of all employees in the above unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. By unilateral changes of wages and working conditions of employees in said unit on September 4, 1970, and by thereafter failing and refusing, on request, to recognize, meet and bargain with said Union as such bargaining agent with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of employees in said unit, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

5. The strike of Respondent's employees on September 22, 1970, was caused by the unfair labor practices of Respondent found above, and is an unfair labor practice strike within the meaning of the Act.

The Remedy

Having found that Respondent has failed and refused to recognize and bargain with the Union as the statutory bargaining agent of its employees in violation of Section 8(a)(5) and (1) of the Act, I shall recommend the usual type of cease and desist and bargaining order, including certain affirmative action designed to effectuate the policies of the Act. While Respondent's unilateral change of wages and working conditions on September 4 included a change in the employees' share of the cost of health insurance, it is not clear from the record that the increased cost covered the same benefits as under the Union's health insurance plan, or included added life insurance or other coverage. I will therefore recommend only that Respondent be ordered to cancel any changes of benefits or working conditions which may have

resulted in financial or other detriment to employees, and to reimburse any who may have suffered financial loss thereby.

As Respondent's employees have been engaging in an unfair labor practice strike, they are entitled to reinstatement upon their unconditional application for reinstatement, and to backpay from the date of such application to the date of an unconditional offer of reinstatement. 21/ Here, 10 strikers made a proper request for reinstatement on March 26, 1971, and on a later date not specified Respondent sent them letters requesting them to return to work, but none of them did; 8 came in at one time with Ramnytz to arrange a return date, but all remained on strike. Hence, the strikers need not be offered reinstatement, but they are entitled to backpay only from the date of Respondent's receipt of their offer of March 26, 1971, to the dates they received the letters offering reinstatement. 22/ While those dates are not clear in the record, they can be ascertained from company, employee or union records. Backpay shall be computed in accordance with the formulae set forth in F. W. Woolworth Company, 90 NLRB 289, and Isis Plumbing & Heating Co., 138 NLRB 716. Since there is a lack of cogent proof indicating that the Union or specific strikers engaged in or are clearly liable for misconduct and property damage occurring during the strike which would bar strikers from backpay, I cannot make any recommendation to bar any or all strikers from that relief.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby

21/ Sew Magic, Inc., 184 NLRB No. 115; Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 278; Cast Optics Corporation, 184 NLRB No. 1.

22/ Southwestern Pipe, Inc., 179 NLRB No. 52; O'Daniel Oldsmobile, Inc., 179 NLRB No. 55; Bender Ship Repair Co., et als., 188 NLRB No. 86.

issue the following recommended: 23/

ORDER

Respondent, Spitzer Akron, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Making unilateral changes in wages, rates of pay, hours of employment, or other terms and conditions of employment of its employees in the appropriate unit described below, or failing or refusing in any other manner to recognize, meet or bargain collectively with the above Union, upon request, as the exclusive bargaining representative of its employees in said unit, which is described as follows:

> All auto mechanics, body repairmen, painters, their apprentices and helpers, and lubrication men, employed by Respondent at its place of business in Akron, Ohio, excluding all office clerical employees, salesmen, parts department employees, garage men, and all guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of any of the rights guaranteed to them by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a

23/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

condition of employment, as authorized in the proviso to Section 8(a)(3) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, recognize, meet and bargain collectively with the above-named Union as the exclusive bargaining representative of all its employees in the appropriate unit found above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, cancel any changes of benefits or working conditions of its employees in said unit made on September 4, 1970, or later, which may have resulted in financial or other detriment to said employees, and reimburse them for any financial losses they may have suffered thereby.

(c) Make whole all of its employees who went on strike on September 22, 1970, for any loss of earnings they may have suffered from the time of their unconditional offer to return to work to the date when Respondent offered them reinstatement to their former or substantially equivalent employment.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant or necessary to facilitate a determination of the amounts due to employees under the terms of this Order.

(e) Post at its place of business in Akron, Ohio, copies of the notice attached hereto as "Appendix." 24/ Copies of said notice, on forms to be

24/ In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading (Continued)

provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by it immediately on receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify said Regional Director, in writing, within 20 days from date of receipt of this Decision, what steps Respondent has taken to comply herewith. 25/

Dated at Washington, D. C.

/s/ Eugene F. Frey
Eugene F. Frey
Trial Examiner

24/ (Continued) "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

25/ In the event that this recommended Order is adopted by the Board after exceptions have been filed, notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT make unilateral changes in wages, rates of pay, hours of employment, or other terms and conditions of employment of our employees in the appropriate unit described below, or fail or refuse in any other manner to recognize, meet or bargain collectively with AUTO MECHANICS LOCAL 1363, DISTRICT 54 OF INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, as the exclusive bargaining representative of our employees in said unit, which is described as follows:

> All auto mechanics, body repairmen, painters, their apprentices and helpers, and lubrication men, employed in our place of business in Akron, Ohio, excluding all office clerical employees, salesmen, parts department employees, garage men, and all guards, professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of any of the rights guaranteed to them by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in the proviso to Section 8(a)(3) of the Act.

WE WILL, upon request, recognize, meet and bargain collectively with the above-named Union as the exclusive bargaining representative of all our employees in the above-described unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, upon request, cancel any changes of benefits or working conditions of our employees which we made on September 4, 1970, or later, and which may have resulted in financial or other detriment to our employees, and reimburse them for any financial losses they may have suffered thereby.

WE WILL make whole all of our employees who went on strike on September 22, 1970, for any loss of earnings they may have suffered from the time of their unconditional offer to return to work to the date of our offers of reinstatement to their former or substantially equivalent employment.

SPITZER AKRON, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 1695 Federal Office Building, 1240 E. 9th Street, Cleveland, Ohio 44199 (Tel. No. 216-522-3715)